APPENDIX "A"

LEXSEE 1998 US DIST LEXIS 13108

MARIA HORSEWOOD, Plaintiff, v. KIDS "R" US, d/b/a Toys "R" US - Delaware, Inc., Defendant.

CIVIL ACTION No: 97-2441-GTV

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1998 U.S. Dist. LEXIS 13108

August 13, 1998, Decided
August 13, 1998, Filed, Entered on the Docket

NOTICE: [*1] FOR ELECTRONIC PUBLICATION ONLY

DISPOSITION: Motion to Amend Plaintiff's Suggestions in Opposition to Defendant's Motion for Protective Order Pursuant to *Fed. R. Civ. P. 26(c)* (doc. 49) sustained as uncontested and both Plaintiff's Motion for Protective Order (doc. 28) and Defendant's Motion for Protective Order (doc. 32) deemed moot in part and denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Pursuant to *Fed. R. Civ. P. 26(c)*, the plaintiff, terminated employee, sought an order directing her continued deposition for a convenient date and limited to six hours. The defendant, former employer, sought an order precluding the deposition of its vice president of human resources or, in the alternative, directing that it be taken on a convenient date.

OVERVIEW: The plaintiff, terminated employee, asserted that the defendant, former employer, engaged in unlawful employment practices in violation of Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991. The former employer denied the allegations and asserted that it terminated the plaintiff for a legitimate, non-discriminatory reason. During the course of discovery, both the terminated employee and the former employer moved for protective orders. The court denied the terminated employee's motion to the extent it sought to limit her continued deposition to six hours. The terminated employee offered no evidence to substantiate her assertions. She provided no details as to the harassment or intimidation she would face should the continued deposition require more than six hours. The court also denied the former employer's motion because the terminated employee had the right to seek discovery against the human resources vice president, even if, it was only to show his lack of knowledge. Finally, the court denied imposition of sanctions.

OUTCOME: The court denied both the plaintiff's motion for protective order and the defendant's motion for protective order. Both parties were order to appear for their depositions.

CORE TERMS: deposition, protective order, discovery, good cause, notice, convenient, corporate officer, deponent, noticed, Kan Rule, defense counsel, undue burden, accommodate, scheduling, deposed, manager, amend, deadline, personal knowledge, accommodation, disability, scheduled, deposing, moot, job descriptions, human resource, time limits, advisory committee's, demonstration, precluding

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Relevance

[HN1] The deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing litigants in civil trials.

Civil Procedure > Discovery > Methods > General

Overview
Civil Procedure > Discovery > Privileged Matters > General Overview
Civil Procedure > Discovery > Relevance
[HN2] The Federal Rules of Civil Procedure provide that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. *Fed. R. Civ. P. 26(b)(1)*. Courts broadly construe relevancy at the discovery stage. A request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.

Civil Procedure > Discovery > Methods > General Overview
Civil Procedure > Discovery > Protective Orders
Civil Procedure > Discovery > Undue Burdens
[HN3] Discovery provisions are also subject to the injunction of *Fed. R. Civ. P. 1* that they be construed to secure the just, speedy, and inexpensive determination of every action. In addition, upon motion by a party and for good cause shown, the court may make any order which justice requires protecting a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Fed. R. Civ. P. 26(c)*. Although the rules contemplate discovery as a nearly unencumbered search for the truth, courts also recognize it as an intrusive fact-gathering tool that is subject to abuse. Courts, therefore, balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled.

Civil Procedure > Discovery > Protective Orders
[HN4] A party is entitled to request a protective order to preclude any inquiry into areas that are clearly outside the scope of appropriate discovery. The party seeking a protective order bears the burden to show good cause for it. To establish good cause, the movant must submit a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.

Civil Procedure > Discovery > Methods > Oral Depositions
Civil Procedure > Discovery > Undue Burdens
[HN5] *Fed. R. Civ. P. 26(b)(2)* authorizes limitations of time on depositions. *Fed. R. Civ. P. 30(d)(2)* likewise provides authority to limit the time permitted for the conduct of a deposition. Courts avoid imposing artificial time limits for depositions, nevertheless, because "the length of the deposition will vary depending on the nature of the action, the issues raised, and the deponent's involvement in the case.

Civil Procedure > Discovery > Undue Burdens
[HN6] Mere assertions by plaintiff of harassment and intimidation provide no evidence of undue burden.

Civil Procedure > Discovery > Protective Orders
[HN7] Due to the broad scope of discovery, it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition. Courts may, nevertheless, grant a protective order prohibiting the taking of a deposition when it believes that the information sought is wholly irrelevant to the issues or prospective relief. The normal practice however is to deny motions to thwart a deposition. An order barring a litigant from taking a deposition is most extraordinary relief. Courts rarely grant a protective order that totally prohibits a deposition, unless extraordinary circumstances are present. In fact, such a prohibition is a "drastic action."

Civil Procedure > Discovery > Relevance
[HN8] A party seeking discovery may test an asserted lack of knowledge.

Civil Procedure > Discovery > Protective Orders
[HN9] A showing that discovery may involve some inconvenience does not suffice to establish good cause for issuance of a protective order.

Business & Corporate Law > Corporations > General Overview
Civil Procedure > Discovery > Methods > Oral Depositions
Civil Procedure > Discovery > Relevance
[HN10] A deposing party may obtain the deposition of a corporation through two alternative methods. Pursuant to *Fed. R. Civ. P. 30(b)(6)*, the deposing party may name the corporation as the deponent and then the corporation designates one or more employees to testify on its behalf. Alternatively, however, a deposing party may, pursuant to *Fed. R. Civ. P. 30(b)(1)*, specifically name as the deponent a corporate employee. If the named employee is

a director, officer, or managing agent of the corporation, such employee will be regarded as a representative of the corporation. Regardless of which method is used, the corporation is responsible for producing its representative for deposition. If other officials of the corporate defendant have relevant information but did not testify pursuant to *Fed. R. Civ. P. 30(b)(6)*, a party may depose them.

Civil Procedure > Discovery > Methods > Stipulations
[HN11] A party generally may choose the order and manner of discovery.

Civil Procedure > Discovery > Relevance
[HN12] *Fed. R. Civ. P. 26(c)* provides that if the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery.

COUNSEL: For MARIA HORSEWOOD, plaintiff: Denise M. Anderson, Anderson Platts Law Firm, Kansas City, MO.

For KIDS "R" US, defendant: James R Williams, Beth R Meyers, Mindy S Novick, Jackson, Lewis, Schnitzler & Krupman, New York, NY.

For KIDS "R" US, defendant: Melody L. Nashan, Lathrop & Gage L.C., Kansas City, MO.

JUDGES: Gerald L. Rushfelt, United States Magistrate Judge.

OPINION BY: Gerald L. Rushfelt

OPINION

MEMORANDUM AND ORDER

The court has under consideration Plaintiff's Motion for Protective Order (doc. 28); Defendant's Motion for Protective Order (doc. 32); and a Motion to Amend Plaintiff's Suggestions in Opposition to Defendant's Motion for Protective Order Pursuant to *Fed. R. Civ. P. 26(c)* (doc. 49). Pursuant to *Fed. R. Civ. P. 26(c)* and D.Kan. Rules 26.2 and 37.1, plaintiff Maria Horsewood seeks an order **[*2]** directing her continued deposition for a convenient date and limited to six hours. Defendant Toys "R" Us - Delaware, Inc. seeks an order precluding the deposition of Richard Cudrin or, in the alternative, directing that it be taken on a convenient date. In its reply brief defendant suggests that plaintiff pursue its proposed inquiry to Cudrin through interrogatories or deposition upon written questions. It also requests that any deposition of Cudrin be limited to six hours. Both parties seek an award of costs incurred in relation to their motions. Each party opposes the motion of the other.

Plaintiff also moves to amend her brief in opposition to the motion of defendant. She wants to attach exhibits inadvertently omitted from her original opposition. Defendant has filed no response to the motion to amend. Accordingly, the court grants it as uncontested. *See* D.Kan. Rule 7.4.

I. Factual and Procedural Background

Plaintiff alleges that defendant has engaged in unlawful employment practices in violation of Title I of the Americans With Disabilities Act of 1990 (ADA) and Title I of the Civil Rights Act of 1991. (Compl. P 1, doc. 1.) Defendant employed her from March 21 **[*3]** through August 30, 1996. (Answer P 11, doc. 7.) She claims to be diabetic and legally blind. (Compl. P 11.) She alleges that defendant knowingly and intentionally refused to reasonably accommodate her disabilities and discharged her in retaliation for the exercise of rights protected by the ADA. (*Id.* PP 12 & 14.) Defendant denies the allegations and asserts, *inter alia*, that it was motivated by reasonable factors other than disability, that it made good faith efforts to reasonably accommodate her, and that it terminated her for a legitimate, non-discriminatory reason. (Answer PP 20-28.)

After consultation with the parties, this court issued a scheduling order which adopts "the deadlines and other provisions set forth in the Report of Parties' Planning Meeting (doc. 13)." (Scheduling Order of Jan. 30, 1998 P c, doc. 15.) The parties proposed discovery as to whether plaintiff could perform the essential functions of her job with or without accommodation and whether defendant was required to reasonably accommodate her. (Report of Parties' Planning Mtg. P 3.) The Scheduling Order set a discovery deadline of June 1, 1998. The court later extended that discovery deadline to July 31, 1998. (Order **[*4]** of June 1, 1998, doc. 43.)

On March 10, 1998, defendant noticed the deposition of plaintiff for April 20 and 21, 1998, at the offices of

defense counsel in Kansas City, Missouri. (Am. Notice Dep., doc. 21.) This constituted "reasonable notice in writing," as required by *Fed. R. Civ. P. 30(b)(1)* and D.Kan. Rule 30.1. The deposition proceeded as scheduled for a period of seven and one-half hours. Two days later defendant noticed the continuing deposition of plaintiff to commence May 19, 1998, and to continue from day to day until completed. (Notice Continuing Dep., doc. 24.) On May 11, 1998, plaintiff noticed a deposition for Cudrin on May 22, 1998, in Paramus, New Jersey. Cudrin is Vice President Human Resources U.S. Toy Stores/Corporate Employee Relations for defendant. He oversees the creation, implementation, and enforcement of policies and procedures relating to its employees. (Aff. of Richard Cudrin PP 1-2, as attached to Def.'s Mot. Prot. Order, doc. 32, hereinafter Cudrin Aff.)

II. Standard For Issuance of Protective Order

"The [United States Supreme] Court has more than once declared that [HN1] the deposition-discovery rules are to be accorded a broad and liberal treatment **[*5]** to effect their purpose of adequately informing litigants in civil trials." *Herbert v. Lando, 441 U.S. 153, 176, 60 L. Ed. 2d 115, 99 S. Ct. 1635 (1979)*. To accomplish that purpose [HN2] the Federal Rules of Civil Procedure provide that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." *Fed. R. Civ. P. 26(b)(1)*. Courts broadly construe relevancy at the discovery stage. *Caldwell v. Life Ins. Co. of N. Am., 165 F.R.D. 633, 638 (D. Kan. 1996)*. "[A] request for discovery should be considered relevant if there is *any possibility* that the information sought may be relevant to the subject matter of the action." *Id.* (emphasis added).

[HN3] Discovery provisions are also "subject to the injunction of *Rule 1* that they 'be construed to secure the just, speedy, and inexpensive determination of every action.'" *Lando, 441 U.S. at 176*. In addition, "upon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. **[*6]** " *Fed. R. Civ. P. 26(c)*. Although the rules contemplate discovery as a nearly unencumbered search for the truth, courts also recognize it as an intrusive fact-gathering tool that is subject to abuse. Courts, therefore, "balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled." *Frank v. County of Hudson, 924 F. Supp. 620, 623 (D.N.J. 1996)* (citing *Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994)*; *see also, Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1368 (10th Cir. 1997)* (holding that "the desire to afford 'broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant'")

The motions address the sound discretion of the court. *Thomas v. IBM, 48 F.3d 478, 482 (10th Cir. 1995)*. "[[HN4] A] party is entitled to request a protective order to preclude any inquiry into areas that are clearly outside the scope of appropriate discovery." *Caldwell, 165 F.R.D. at 637*. The party seeking a protective order bears the burden to show good **[*7]** cause for it. *Sentry Ins. v. Shivers, 164 F.R.D. 255, 256 (D. Kan. 1996)*. To establish good cause, the movant must submit "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Gulf Oil v. Bernard, 452 U.S. 89, 102 n.16, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981)*; *see also, In re Terra Int'l, Inc., 134 F.3d 302, 306-07 (5th Cir. 1998)* (granting petition for writ of mandamus and instructing district court to vacate a protective order based solely on a conclusory allegation and unsupported by a particular and specific demonstration of fact).

III. Plaintiff's Motion for Protective Order

Plaintiff seeks an order to limit her continued deposition to six hours and to direct that it be rescheduled for a convenient time. She suggests that defendant, with knowledge that her counsel would be unavailable, scheduled the deposition for May 19, 1998. The notice directs her to appear at the offices of defense counsel for deposition to continue from day to day until completed. (Notice Continuing Dep.) She further suggests that defendant, without advising her of its availability **[*8]** and for no given reason, refused to reschedule her deposition for another day of that same week. She claims that she made herself available at the appointed time for her initial deposition in April, but concedes that she gave only seven and one-half hours of testimony. She acknowledges her need for short breaks due to her diabetic condition. Because of her vision impairment she also requires more than usual time to review documents during her deposition. She asserts that requiring a substantial amount of documentation to be read to her while all counsel remain in the room, however, is

harassing and intimidating. She contends that defense counsel is attempting to harass and intimidate her by continuing her deposition beyond a reasonable time.

Defendant suggests that plaintiff did not serve her motion papers until two business days prior to the scheduled date for the deposition. Due to this late service and alleged "manipulation of the process," defendant contends it has been prejudiced because it had no choice but to acquiesce to a continuance of her continued deposition. It asserts that it could not avoid scheduling the deposition on May 19, 1998, due to the then existing discovery **[*9]** deadline of June 1, 1998, and the unavailability of opposing counsel for any other day in May. It concedes that it will not contest the rescheduling of the deposition to a convenient date, however, if plaintiff obtains an extension of the discovery deadline.

Defendant also objects to the request to limit the continued deposition to an additional six hours. It attributes the "paucity of actual deposition time" to untimely arrival and interruptions on the part of plaintiff and her counsel and the fact that plaintiff requires a significant amount of time to read exhibits. It suggests this may necessitate a second day of deposition, if it cannot finish in a day. It argues that limiting the continued deposition may preclude it from fully exploring plaintiff's extensive medical history, job performance, requests for accommodation, and the nature of her alleged damages.

The scheduled date for the deposition has passed. The court finds the arguments of prejudice moot. The court deems plaintiff's motion for a protective order moot to the extent it seeks protection against a deposition on May 19, 1998.

Plaintiff also contends, however, that her continued deposition should be limited to an **[*10]** additional six hours. She offers no authority in support of this position. "The Federal Rules of Civil Procedure do not set any limit on the length of depositions." *Downs v. Brasted, 1993 U.S. Dist. LEXIS 19695*, No. 92-1611- MLB, 1993 WL 566203, at *1 (D. Kan. July 21, 1993). [1] [HN5] *Fed. R. Civ. P. 26(b)(2)* authorizes limitations of time on depositions. *Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 145 F.R.D. 92, 98 (S.D. Iowa 1992). Fed. R. Civ. P. 30(d)(2)* likewise provides authority "to limit the time permitted for the conduct of a deposition." Courts avoid imposing artificial time limits for depositions, nevertheless, because "the length of the deposition will vary depending on the nature of the action, the issues raised, and the deponent's involvement in the case." *Brasted*, 1993 WL 566203, at *1.

1 "In 1992, the Advisory Committee on the Civil Rules proposed extensive revisions to the Rules. [It] initially proposed revising *Rule 30* to add a six hour time limitation on each deposition unless the parties stipulated otherwise or obtained leave of court." *Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 145 F.R.D. 92, 99 n.4 (S.D. Iowa 1992)*. A majority of the Advisory Committee, however, rejected any presumptive limit on the length of depositions. *See Brasted*, 1993 WL 566203, at *1.

[*11] [HN6]

Mere assertions by plaintiff of harassment and intimidation provide no evidence of undue burden. *Cf. Sentry Ins. v. Shivers, 164 F.R.D. 255, 257 (D. Kan. 1996)* (bald assertions of emotional and financial stress do not show undue burden). She offers no evidence, by affidavit, transcript, or otherwise, to substantiate these assertions. She provides no details as to the harassment or intimidation she would face should the continued deposition require more than six hours. She presents no evidence that the previous deposition unreasonably annoyed, embarrassed, or oppressed her, or that the continued deposition will likely do so. She makes no showing that her disabilities necessitate an artificial time limit. On the contrary, her need for several intermissions and time to read documents suggests that an artificial time limit may unfairly limit the discovery.

Plaintiff merely offers conclusory and speculative statements about the need for a protective order. She has not established good cause. The court denies her motion for protective order to the extent it seeks to limit her continued deposition to six hours. If defendant were to conduct the examination in bad faith **[*12]** or in such a manner as to unreasonably annoy, embarrass, or oppress her, she may provide grounds for relief. *See Fed. R. Civ. P. 30(d)(3)*.

IV. Defendant's Motion for Protective Order

Defendant has failed to comply with D.Kan. Rule 37.1. The Rule provides in pertinent part: "Motions under *Fed. R. Civ. P. 26(c)* . . . directed at depositions . . . shall be accompanied by copies of the notices of depositions . . . in dispute." Defendant attached no copy of the notice of

deposition for Richard Cudrin which is in dispute. "Failure to comply with D.Kan. Rule 37.1 often makes it difficult, if not impossible, for the court to determine exactly what should be compelled or protected. The court, therefore, generally overrules motions that lack the required attachments." *Burnett v. Western Resources, Inc., 1996 U.S. Dist. LEXIS 3641*, No. 95-2145- EEO, 1996 WL 134830 at *2 (D. Kan. Mar. 21, 1996). The motion and its supporting memorandum, however, adequately inform the court of the dispute. The court thus waives strict compliance with the rule and considers the motion on its merits.

Defendant seeks an order to preclude the deposition of Cudrin or, **[*13]** in the alternative, directing that it proceed on a convenient date. He avers that he was "committed to participate in a court ordered mediation in another matter taking place in California on May 22, 1998, the date for which [his] deposition [had] been noticed." (Cudrin Aff. P 6.) Plaintiff has consented to reschedule the deposition to a date convenient for both parties. Accordingly, the court deems defendant's motion for a protective order moot to the extent it seeks protection against proceeding on May 22, 1998.

The question remains, nevertheless, whether the deposition should otherwise be prohibited. Defendant asserts that a deposition would disrupt both Cudrin's work and its business operations and would therefore be unduly burdensome. It argues that he lacks relevant knowledge and that plaintiff has already deposed several witnesses with pertinent information, including Debra Schwartzfarb as its 30(b)(6) representative.

Plaintiff disputes these contentions. She says that Cudrin has relevant knowledge. She further disputes the alleged hardship his deposition would impose. She asserts that Ms. Schwartzfarb identified Cudrin as the individual with information about policies, **[*14]** procedures, and job descriptions which contain the essential function for each position of defendant. Plaintiff characterizes this information as critical to the material issue of whether she could perform the essential functions of her position with a reasonable accommodation, or that of other positions in the store.

To demonstrate good cause for the protective order, defendant submits two affidavits of Cudrin. He declares in the first affidavit that, prior to plaintiff's EEOC complaint of January 1997, he was unaware of any facts relating to her employment or termination from defendant. (Cudrin Aff. P 3.) He further states: "I have never reviewed any documents relating to Ms. Horsewood other than her EEOC complaint, Summons and Complaint in the instant action and documents prepared by [defense] counsel . . . with respect to this litigation." (*Id.*) Cudrin further avers that he did not speak with anyone regarding plaintiff during the time she was employed by defendant. (*See id.* P 4.) He acknowledges, however, that his responsibilities include "overseeing the creation, implementation and enforcement of all policies and procedures relating to employees of . . . Kids 'R' Us. **[*15]** " (*Id.* P 2.) He also admits in both affidavits that divisional and regional human resource managers occasionally seek his advice on employee-related matters. (*See id.*; Aff. of Richard Cudrin P 2 as attached to Def.'s Reply Mem., herein-after Second Aff.) In response to the passage of the ADA, furthermore, he convened committees to identify and define the essential functions of each job position of defendant. He was responsible for reviewing these findings. (Second Aff. P 4.)

[HN7] Due to the broad scope of discovery, "it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition." *Naftchi v. New York Univ. Med. Ctr., 172 F.R.D. 130, 132 (S.D.N.Y. 1997)*. Courts may, nevertheless, "grant a protective order prohibiting the taking of a deposition when it believes that the information sought is wholly irrelevant to the issues or prospective relief." *Leighr v. Beverly Enterprises-Kansas Inc., 164 F.R.D. 550, 551-52 (D. Kan. 1996)* (quoting United States ex rel. Westinghouse Elec. Corp. v. Coonrod & Assocs. Constr. Co., No. 89-2274-O, unpublished op. at 3 (D. Kan. Jan. 28, 1991)). The normal practice **[*16]** of this court, however, is to deny motions to thwart a deposition. *Id. at 552*; *Land v. United Tele. S.E., Inc., 1995 U.S. Dist. LEXIS 3746*, No. Civ.A. 95- MC-220-KHV, 1995 WL 128500, at *5 (D. Kan. Mar. 22, 1995). "An order barring a litigant from taking a deposition is most extraordinary relief." *Speadmark, Inc. v. Federated Dep't Stores, Inc., 176 F.R.D. 116, 117 (S.D.N.Y. 1997)*. Courts "rarely grant a protective order which totally prohibits a deposition, unless extraordinary circumstances are present." *Mike v. Dymon, Inc., 169 F.R.D. 376, 378 (D. Kan. 1996)*. In fact, this court has characterized such a prohibition as a "drastic action." *Deines v. Vermeer Mfg. Co., 133 F.R.D. 46, 48 n.3 (D. Kan. 1990)*.

As a general rule [HN8] a party seeking discovery may test an asserted lack of knowledge. *See Naftchi, 172*

F.R.D. at 132 (citing 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2037 (2d ed. 1994) [hereinafter Wright]); *Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 145 F.R.D. 92, 97 (S.D. Iowa 1992)*. The deposition of **[*17]** Cudrin appears reasonably calculated to lead to the discovery of admissible evidence. The discovery plan incorporated into the Scheduling Order of January 30, 1998, designates the following subjects for discovery: (1) whether plaintiff could perform the essential functions of her job with or without accommodation; (2) whether defendant was required to reasonably accommodate her. Cudrin had a supervisory role in developing the job descriptions that purportedly define the essential functions of each position, specifically in response to the passage of the ADA. One may reasonably assume he knows about the job descriptions and essential functions of the work. He also had responsibility and familiarity with creating, implementing, and enforcing the ADA policies of defendant. He may well know to what extent defendant can or should be able to accommodate a diabetic and legally blind employee.

Defendant argues that Cudrin's status as a corporate officer supports a showing of good cause for the requested protective order. In support of this proposition it cites *Thomas v. IBM, 48 F.3d 478 (10th Cir. 1995)*, two cases cited by the court in *Thomas: Lewelling v. Farmers Insurance of Columbus, Inc., 879 F.2d 212 (6th Cir. 1989)*, **[*18]** and *Salter v. Upjohn Co., 593 F.2d 649 (5th Cir. 1979)*, and this court's ruling in *Gazaway v. Makita USA, Inc., 1998 U.S. Dist. LEXIS 6355*, No. 97-2287-JWL, 1998 WL 219771 (D. Kan. April 16, 1998). These cases do not help defendant.

In *Lewelling* a group of employees brought an action for breach of contract and fraud against their former employer. *See 879 F.2d at 213*. The district court granted summary judgment in favor of the employer. The employees appealed. *See id.* During discovery the plaintiffs had sought to depose the Chairman of the Board and Chief Executive Officer of the corporate defendant. The district court had issued a protective order against a deposition. *See id. at 218*. The Sixth Circuit Court of Appeals merely held that the district court had not abused its discretion in issuing the protective order. Collateral efforts to annoy, harass, and press the defendant into a settlement discussion, rather than the professed lack of knowledge of the deponent, provided the good cause necessary for the protective order. The court finds no such conduct in the instant case.

Salter, **[*19]** *Thomas*, and *Gazaway* have common holdings. They provide that a deposition notice violative either of a procedural requirement or of the general principle that a corporate officer be deposed at the principal corporate place of business of the defendant may pose an undue burden upon a corporate defendant and provide good cause for a protective order. Each of the cases had circumstances which are absent here. Despite defendant's contention in *Salter* that its corporate officer lacked personal knowledge, the court authorized the deposition, if the plaintiff were not satisfied after deposing other witnesses employed by the defendant. The *Thomas* court, likewise, found a failure to depose other corporate personnel to be a factor in precluding the deposition of a corporate officer.

In the case before the court plaintiff has deposed several witnesses employed by defendant. They include the manager and two assistant managers of the Overland Park, Kansas store that employed her. She has deposed the district manager who oversaw operations at the store during part of her employment. She has noticed the deposition of the district manager who oversaw these operations when defendant hired **[*20]** her. She has deposed Debra Schwartzfarb, the Director of Human Resources for Kids "R" Us employees, as corporate representative under *Fed. R. Civ. P. 30(b)(6)*. Ms. Schwartzfarb identified Cudrin as the person to whom two of her deposition questions should be directed.

Consistent with the general rule that a party seeking discovery is entitled to test an asserted lack of knowledge, the representation by the defendants in *Salter* and *Gazaway* that their respective corporate officers lacked personal knowledge did not establish good cause for precluding the requested depositions. In *Salter* the court observed that the deposition should have been allowed if the plaintiff had given proper notice. *See 593 F.2d at 651*. Similarly, in *Gazaway*, this court held that the corporate defendant was not required to bear the burden and expense of transporting the corporate officer from Japan to Kansas City, but otherwise allowed the deposition to be taken. *See* 1998 WL 219771 at *3. In *Thomas* an asserted lack of knowledge was merely one among several weightier circumstances which established good cause to preclude the deposition. *See 48 F.3d at 483*. **[*21]** Defendant here suggests lack of personal knowledge as the sole basis for the protective order. It

has not shown that the deposition would be unduly burdensome. It has not established good cause for a protective order.

The probability that Cudrin can provide relevant evidence to a material issue outweighs the suggested burden of his deposition. That Cudrin is too busy and that a deposition will disrupt his work carries little weight. Most deponents are busy. Most depositions involve some disruption of work or personal business. "[[HN9] A] showing that discovery may involve some inconvenience . . . does not suffice to establish good cause for issuance of a protective order." *Tolon v. Board of County Comm'rs, 1995 U.S. Dist. LEXIS 19100*, No. 95-2001-GTV, 1995 WL 761452, at *3 (D. Kan. Dec. 18, 1995).

The affidavits of Richard Cudrin present nothing of consequence to warrant a finding of undue burden. Defendant has failed to establish by a particular and specific demonstration of fact that a protective order is warranted. The representation that Cudrin lacks personal knowledge does not suffice to meet its burden of showing good cause for a protective order. **[*22]** Accordingly, the court denies the motion for protective order of defendant to the extent it seeks to preclude the deposition of Richard Cudrin.

Defendant notes that Cudrin's deposition is not noticed as that of a corporate representative. The court finds that fact of no consequence. [HN10] A deposing party may "obtain the deposition of a corporation through two alternative methods." *Moore v. Pyrotech Corp., 137 F.R.D. 356, 357 (D. Kan. 1991)*. Pursuant to *Fed. R. Civ. P. 30(b)(6)*, the deposing party may name the corporation as the deponent and then the corporation designates one or more employees to testify on its behalf. *See id.*

> Alternatively, however, a deposing party may, pursuant to *Rule 30(b)(1)*, specifically name as the deponent a corporate employee. If the named employee is a director, officer, or managing agent of the corporation, such employee will be regarded as a representative of the corporation. Regardless of which method is used, the corporation is responsible for producing its representative for deposition.

Id. (citations omitted). If other officials of the corporate defendant have relevant information but did not testify pursuant **[*23]** to *Rule 30(b)(6)*, a party may depose them. *See Stone v. Morton Int'l, Inc., 170 F.R.D. 498, 499-504 (D. Utah 1997)*; *Fed. R. Civ. P. 30(b)(6)* advisory committee's note (1970 amend.).

Defendant also suggests that plaintiff may obtain information from Cudrin through interrogatories or deposition upon written questions. It has shown no adequate reason for imposing an alternative method of discovery over the one chosen by plaintiff. [HN11] A party generally may choose the order and manner of discovery.

Defendant also requests that any deposition of Cudrin be limited to six hours. It has shown insufficient grounds for such a limitation. For reasons stated previously, the court disfavors arbitrary time limitations on depositions.

V. Sanctions

Overruling a motion for protective order prompts consideration of sanctions under *Fed R. Civ P. 37(a)(4)(B)*. *See Fed. R. Civ. P. 26(c)*. *Rule 37(a)(4)(B)* provides in pertinent part:

> If the motion is denied . . . the court shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable **[*24]** expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust."

The court finds sanctions unjustified. Each party shall bear its own expenses incurred on the motions and subsequent briefing.

VI. Discretionary Authority to Compel Discovery

[HN12] *Fed. R. Civ. P. 26(c)* also provides that "if the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or

permit discovery." Pursuant to this provision, the court directs plaintiff to appear for her continued deposition at the offices of defense counsel in Kansas City, Missouri on a mutually convenient date, or at any other place to which the parties may agree. The court further directs defendant to produce Richard Cudrin for deposition in Paramus, New Jersey, on a date mutually convenient, or at any other place to which the parties may agree.

VII. Conclusion

In summary, the court sustains the Motion to Amend Plaintiff's Suggestions in Opposition to Defendant's Motion **[*25]** for Protective Order Pursuant to *Fed. R. Civ. P. 26(c)* (doc. 49) as uncontested and deems moot in part and otherwise denies both Plaintiff's Motion for Protective Order (doc. 28) and Defendant's Motion for Protective Order (doc. 32) as herein set forth. Pursuant to its discretionary authority to compel discovery when denying a proposed protective order, it orders plaintiff and Richard Cudrin to appear for their depositions as set forth herein. The court denies sanctions.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 13th day of August, 1998.

Gerald L. Rushfelt

United States Magistrate Judge

LEXSEE 2007 U.S. DIST. LEXIS 51734

RITA MILES, PLAINTIFFS v. WAL-MART STORES, INC., et al, DEFENDANTS

No. 5:06-cv-5162-RTD

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FAYETTEVILLE DIVISION

2007 U.S. Dist. LEXIS 51734

July 17, 2007, Decided
July 17, 2007, Filed

SUBSEQUENT HISTORY: Motion denied by *Mills v. Wal-Mart Stores, Inc., 2007 U.S. Dist. LEXIS 57895 (W.D. Ark., Aug. 7, 2007)*

PRIOR HISTORY: *Miles v. Wal-Mart Stores, Inc., 2007 U.S. Dist. LEXIS 46747 (W.D. Ark., June 25, 2007)*

CORE TERMS: deposition, protective order, discovery, good cause, undue burden, discovery process, high level, embarrassment, oppression, admissible, annoyance, lawsuit, corporate executives, harassment, moot

COUNSEL: **[*1]** For Rita Miles, Plaintiff: James G. Lingle, LEAD ATTORNEY, Lingle Law Firm, Rogers, AR.

For Wal-Mart Stores, Inc., Defendant: Vince Chadick, Bassett Law Firm, LLP, Fayetteville, AR.

JUDGES: James R. Marschewski, United States Magistrate Judge.

OPINION BY: James R. Marschewski

OPINION

ORDER

Before the court is the Defendant's Motion for Protective Order (Doc. 28) and Memorandum Brief (Doc. 29) filed June 29, 2007 and the Plaintiff's Response (Doc. 31) and Memorandum Brief (Doc. 32) filed July 13, 2007. The matter has been referred to the undersigned for disposition by Order (Doc. 30) entered July 2, 2007.

Background:

The plaintiff claims damages against the defendant for violation of the Sarbanes-Oxley Act seeking compensatory damages, reinstatement, back pay, damages for loss of future earnings capacity, costs and fees.

The Plaintiff is seeking to take the deposition of President and Chief Executive Officer of Wal-Mart, Lee Scott, and Executive Vice President and Corporate Secretary, Tom Hyde, who at the time of the events giving rise to this lawsuit oversaw the Wal-Mart's Legal Department. Wal-Mart brings this Motion pursuant to *Federal Rule of Civil Procedure 26(c)* on the grounds that the depositions of H. Lee Scott **[*2]** and Thomas Hyde would cause "annoyance, embarrassment, oppression, or undue burden or expense." *Fed. R. Civ. P. 26(c).*

This case centers around the Department of Justice investigation of the ex President and CEO of Wal-Mart. Plaintiff notified the F.B.I. that Wal-Mart was conducting a shredding operation of pertinent documents and, as a result, the Department of Justice conducted a search of Wal-Mart's home office. The Plaintiff contends that on the weekend after Wal-Mart's offices were raided, the U.S. Attorney, members of his staff, and F.B.I. agents met with and asked for full cooperation with the Coughlin investigation from H. Lee Scott and Tom Hyde.

The Plaintiff contends that as a result of her action Wal-Mart did "step up intimidation tactics against Plaintiff, and otherwise retaliate with psychological harassment, physical harassment, damage to her personal

property and giving her undeserved low evaluation scores". (Doc. 1, page 4-5)

The Defendant seeks a Protective Order with regard to the notices duces tecum served upon it by the Plaintiff concerning the testimony of Mr. Scott and Mr. Hyde.

Discussion:

It is well-established that the scope and conduct of discovery are within the **[*3]** sound discretion of the trial court. *Marroquin-Manriquez v. Immigration and Naturalization Serv., 699 F.2d 129, 134 (3d Cir.1983).* The Federal Rules of Civil Procedure permit discovery of "any matter, not privileged, that is relevant to the claim or defense of any party." *Fed.R.Civ.P. 26(b)(1).* Discovery is not limited solely to admissible evidence but encompasses matters which "appear[ ] reasonably calculated to lead to the discovery of admissible evidence." See *id*; *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).* "Relevance is construed broadly and determined in relation to the facts and circumstances of each case." *Hall v. Harleysville Ins. Co., 164 F.R.D. 406, 407 (E.D.Pa.1996).*

Fed.R.Civ.P. 26(c) provides that the Court may, upon a showing of good cause, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The party seeking a protective order has the burden to show good cause for it. *Reed v. Bennett, 193 F.R.D. 689, 691 (D.Kan.2000). General Dynamics Corp. v. Selb Mfg. Co. 481 F.2d 1204, *1212 (C.A.1973)* To establish good cause, that party must make "a particular **[*4]** and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Pepsi-Cola Bottling Co. of Pittsburgh, Inc. v. Pepsico, Inc., Case No. 01-2009, 2002 U.S. Dist. LEXIS 8134, 2002 WL 922082, at *1 (D.Kan. May 2, 2002)* (quotations and citations omitted). *General Dynamics Corp. v. Selb Mfg. Co., Id*

While the Court may grant a protective order prohibiting the taking of a deposition when it believes that the information sought is wholly irrelevant to the issues in the case, the normal practice of this Court (10th Circuit) is to deny motions that seek to entirely bar the taking of a deposition. *Horsewood v. Kids "R" Us, Case No. 97-2441, 1998 U.S. Dist. LEXIS 13108, 1998 WL 526589, at *5 (D.Kan. Aug. 13, 1998). Van Den Eng v. Coleman Co., Inc. 2005 U.S. Dist. LEXIS 40720, 2005 WL 3776352, *2 (D.Kan.)* (D.Kan.,2005)

The court certainly recognizes that taking depositions of high level corporate employees has the potential for abuse and that the court should be attune to that potential. *Folwell v. Hernandez, 210 F.R.D. 169, 173 (M.D.N.C. 2002)* There has been no showing that the Plaintiff has abused the discovery process or has not sought or been willing to accommodate the witnesses.

The Court rejects Wal-Mart's assertion that high-level corporate **[*5]** executives ("Apex Officials") cannot be deposed unless the party seeking the deposition can show that (1) the executive has unique or special knowledge of the facts at issue and (2) the seeking party has exhausted other less burdensome avenues for obtaining the information sought. The Defendant seeks to put the burden on the Plaintiff to show why the deposition should be taken as opposed to the burden being on the Defendant to show why it should not. Court does not believe that the burden rest with the Plaintiff and in the cases cited by the Defendant, almost invariably, the Defendant had produced affidavits to show that the witness did not have specific knowledge about the facts relating to the lawsuit.

All of the behavior that underlies this cause of action originated at the very top of the chain of command in one of the largest corporations in the world. It is certainly reasonable to the court to believe that very high level employees could have pertinent information concerning the Plaintiff's claim arising out of a "whistleblowing" incident which involved the highest corporate executive employed by the Defendant. This is not to say that the Plaintiff may order the witnesses to be **[*6]** produced without reasonable accommodation to their busy schedules, or that preliminary discovery may make the matter moot but the Defendant's blanket assertion that the Plaintiff should have no access to these witnesses is incorrect.

Conclusion:

The Motion for Protective Order is DENIED but the Court will direct that the depositions of these two witnesses shall come later in the discovery process, rather than sooner, in the hope that the necessity for one or both depositions may become moot.

IT IS SO ORDERED this 17th day of July 2007.

/s/ James R. Marschewski

United States Magistrate Judge

LEXSEE 2001 U.S. DIST. LEXIS 10097

CANAL BARGE COMPANY, Plaintiff/Counter-Defendant, v. COMMONWEALTH EDISON COMPANY, Defendant/Counter-Plaintiff.

Case No. 98 C 0509

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2001 U.S. Dist. LEXIS 10097

July 18, 2001, Decided
July 19, 2001, Docketed

DISPOSITION: [*1] ComEd's Motion to Quash Notice of Deposition DENIED and Canal Barge's Motion to Strike Notices of *Rule 30(b)(6)* Depositions and Riders Attached to Notices of Depositions GRANTED in part and DENIED in part.

CASE SUMMARY:

PROCEDURAL POSTURE: The action involved the claims and cross-claims of the parties arising from maintenance and insurance charges and alleged nonpayment. Before the court were defendant's motion to quash a notice of deposition and plaintiff's notice to strike notices of deposition and riders attached to the notices.

OVERVIEW: Defendant argued that the areas of inquiry in the deposition notice asked for knowledge of its legal position and were inappropriate under *Fed. R. Civ. P. 30(b)(6)*. The court disagreed. Plaintiff was entitled to know the basis for defendant's legal position, and the information request was not privileged. The inquiries were more appropriately posed in a deposition that by contention interrogatories. The defendant put the matter into issue, thus it was obligated to submit to questioning and to produce knowledgeable employees and/or to prepare a witness by having the witness review the relevant documents. Plaintiff contended, in its motion to strike, that because it had identified only one witness despite being served with six notices, that the witness should only be deposed for one-day under *Fed. R. Civ. P. 30*. The court found that the complexities of the case justified a longer deposition and extended the time to three days for seven hours. The riders to the deposition notices were struck as untimely since the requests were neither "few and simple" nor "closely related to the oral examination sought," but the information already requested was to be brought to the deposition.

OUTCOME: The court denied defendant's motion to quash the deposition notice and granted in part and denied in part plaintiff's motion to strike deposition notices and the attached riders.

CORE TERMS: barge, deposition, notice, rider, designate, advisory committee's, deponent, designee, discovery, business entity, useful life, work performed, production of documents, interrogatory, designated, repair, oral examination, knowledgeable, questioning, untimely, prepare, entity's, subject matter, witness to testify, legal position, legal defense, former employees, personal knowledge, particularity, presenting

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Methods > Oral Depositions

[HN1] *Fed. R. Civ. P. 30(b)(6)* allows litigants to name a business entity as a deponent. *Rule 30(b)(6)* is designed to prevent business entities from "bandying," the practice of presenting employees for their deposition who disclaim knowledge of facts known by other individuals within the entity.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN2] See *Fed. R. Civ. P. 30(b)(6)*.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN3] The *Fed. R. Civ. P. 30(b)(6)* gives the corporation who is being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN4] For a *Fed. R. Civ. P. 30(b)(6)* deposition to operate effectively, the deposing party must designate the areas of inquiry with reasonable particularity, and the corporation must designate and adequately prepare witnesses to address these matters. Once the deposing party specifies the topics of the deposition, it becomes the corporation's duty to designate one or more individuals able to testify about the relevant areas.

Civil Procedure > Discovery > Methods > Oral Depositions
Civil Procedure > Discovery > Methods > Written Depositions
Evidence > Judicial Admissions > General Overview
[HN5] A *Fed. R. Civ. P. 30(b)(6)* deponent's testimony does not represent the knowledge or opinions of the deponent, but that of the business entity. In effect, the deponent is speaking for the corporation, presenting the corporation's position on the topic. The deponent must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs, including the entity's interpretation of events and documents. A corporation is "bound" by its *Rule 30(b)(6)* testimony, in the same sense that any individual deposed under *Rule 30(b)(1)* would be "bound" by his or her testimony, however, this does not mean that the witness has made a judicial admission that formally and finally decides an issue.

Civil Procedure > Discovery > Methods > Interrogatories > General Overview
Civil Procedure > Discovery > Methods > Oral Depositions
[HN6] Generally, inquiry regarding a corporation's legal positions is appropriate in a *Fed. R. Civ. P. 30(b)(6)* deposition. However, some inquiries are better answered through contention interrogatories when the questions involve complicated legal issues. Whether a *Fed. R. Civ. P. 30(b)(6)* deposition or a *Fed. R. Civ. P. 33(c)* contention interrogatory is more appropriate will be a case by case factual determination.

Civil Procedure > Counsel > General Overview
Civil Procedure > Discovery > Methods > Oral Depositions
[HN7] A corporation cannot have its attorney assert that the facts show a particular position on a topic when, at the *Fed. R. Civ. P. 30(b)(6)* deposition, the corporation asserts no knowledge and no position.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN8] If none of a corporation's current employees has sufficient knowledge to provide the movant with the requested information, the corporation is obligated to prepare one or more witnesses so that they may give complete, knowledgeable, and binding answers on behalf of the corporation.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN9] Under the Advisory Committee's Notes to *Fed. R. Civ. P. 30(d)(2)*, if a corporation designates more than one representative in response to a deposition notice under *Rule 30(b)(6)*, the one day limit applies separately to each designee.

Civil Procedure > Discovery > Methods > Oral Depositions
Civil Procedure > Discovery > Methods > Stipulations
Evidence > Competency > Interpreters
[HN10] The language of *Fed. R. Civ. P. 30(d)(2)* limits a deposition to one day of seven hours, unless otherwise authorized by the court or stipulated by the parties. The Advisory Committee's Notes to *Rule 30(d)(2)* contemplate various factors a court may consider in determining whether to order an extension, including the need for an interpreter, if the examination will cover events occurring over a long period of time, if the witness will be questioned about numerous lengthy documents, or in multi-party cases.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN11] See *Fed. R. Civ. P. 30(b)(5)*.

Civil Procedure > Discovery > Methods > Oral Depositions
Civil Procedure > Discovery > Methods > Requests for Production & Inspection
[HN12] A document request under *Fed. R. Civ. P. 30(b)(5)* is a complement to a *Fed. R. Civ. P. 30* deposition, not a substitute for a *Fed. R. Civ. P. 34* document request. Thus, requests which fall under the rubric of a *Rule 30(b)(5)* deposition should be "few and simple" and "closely related to the oral examination" sought. Otherwise, the Court may assume that the document request falls under *Rule 34* and, as such, is barred as untimely under the scheduling order.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN13] See *Fed. R. Civ. P. 30(b)(5)* advisory committee's notes.

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For COMMONWEALTH EDISON COMPANY, counter-claimant: Gary W. Bozick, Hoffman, Burke & Bozick, Chicago, IL.

For CANAL BARGE COMPANY, counter-defendant: Warren J. Marwedel, Shari L. Friedman, William Phillip Ryan, Marwedel, Minichello & Reeb, P.C., Chicago, IL.

JUDGES: Nan R. Nolan, United States Magistrate Judge.

OPINION BY: Nan R. Nolan

OPINION

MEMORANDUM OPINION AND ORDER

Canal Barge Company (Canal Barge) has filed a Complaint against Commonwealth Edison Company (ComEd) seeking payment of two invoices for maintenance and insurance charges incurred in 1996-1997 for the upkeep of barges subject to a contractual agreement between the parties. ComEd admits that it failed to pay the amounts billed in the two invoices, and is asserting **[*2]** in its counterclaim that Canal Barge billed ComEd for invalid charges which fall outside the scope of the contract. This matter is before the Court on ComEd's Motion to Quash Notice of Deposition, (Docket Entry # 73), and Canal Barge's Motion to Strike Notices of *Rule 30(b)(6)* Depositions and Riders Attached to Notices of Depositions, (Docket Entry # 71). For the following reasons, ComEd's Motion to Quash is DENIED and Canal Barge's Motion to Strike is GRANTED in part and DENIED in part.

1. *Federal Rule of Civil Procedure 30(b)(6)*

[HN1] *Federal Rule of Civil Procedure 30(b)(6)* allows litigants to name a business entity as a deponent. *Rule 30(b)(6)* is designed to prevent business entities from "bandying," the practice of presenting employees for their deposition who disclaim knowledge of facts known by other individuals within the entity. *SmithKline Beecham. Corp. v. Apotex Corp., 2000 U.S. Dist. LEXIS 667*, *24, 2000 WL 116082, at *8 (N.D. Ill. Jan. 24, 2000) (citing *Alexander v. F.B.I., 186 F.R.D. 148, 152 (D.D.C.1999))*. *Rule 30(b)(6)* states in pertinent part that:

> [HN2] A party may in the party's notice and in a subpoena name as the deponent a public or private corporation **[*3]** ... and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. . . . The persons so designated shall testify as to matters known or reasonably available to the organization.

Fed. R. Civ. P. 30(b)(6). [HN3] The Rule gives the

corporation being deposed more control by allowing it to designate and prepare a witness to testify on the corporation's behalf. *Fed. R. Civ. P. 30(b)(6)* advisory committee's note. "[HN4] For a *Rule 30(b)(6)* deposition to operate effectively, the deposing party must designate the areas of inquiry with reasonable particularity, and the corporation must designate and adequately prepare witnesses to address these matters." *United States v. Taylor, 166 F.R.D. 356, 360 (M.D.N.C. 1996)*. Once the deposing party specifies the topics of the deposition, it becomes the corporation's duty to designate one or more individuals able to testify about the relevant areas. SmithKline, 2000 WL 116082, **[*4]** at *8.

[HN5] A *Rule 30(b)(6)* deponent's testimony does not represent the knowledge or opinions of the deponent, but that of the business entity. *Taylor, 166 F.R.D. at 361*. In effect, the deponent is "speaking for the corporation," presenting the corporation's position on the topic. Id. The deponent must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs, including the entity's interpretation of events and documents. Id. A corporation is "bound" by its *Rule 30(b)(6)* testimony, in the same sense that any individual deposed under *Rule 30(b)(1)* would be "bound" by his or her testimony, however, this does not mean that the witness has made a judicial admission that formally and finally decides an issue. *W.R. Grace & Co. v. Viskase Corp., 1991 U.S. Dist. LEXIS 14651*, *6, 1991 WL 211647 at *2 (N.D. Ill. Oct. 15, 1991)(citing *Brown & Root, Inc. v. American Home Assur. Co., 353 F.2d 113 (5th Cir.1965)*, cert. denied, *384 U.S. 943, 16 L. Ed. 2d 541, 86 S. Ct. 1465 (1966))*.

II. ComEd's Motion to Quash Notice of Deposition

In its Motion to Quash, ComEd generally argues that the topics designated by Canal Barge are **[*5]** inappropriate for inquiry in a *Rule 30(b)(6)* deposition. Specifically, Canal Barge groups its objections into the following three areas:

> 1) Topics 1-6, 9, 12 call for the designee to speculate and form legal conclusions
>
> 2) Topics 7, 8, and 11 request ComEd's position on the useful life of the barges, which requires the ComEd designee to sift though 600 pages of documents received from Canal Barge
>
> 3) Topics 10 and 13 call for the "legal defense strategies of ComEd with respect to Canal Barge's claims against ComEd."

The Court finds that all of these areas are proper areas of questioning in a *Rule 30(b)(6)* deposition. In the objections grouped under areas 1 and 3, ComEd argues against being required to provide any information which could be characterized as its legal position on the contracts at issue. Canal Barge responds by noting that ComEd's position in its defense of this case is that the work performed is not maintenance under the contracts. Canal Barge contends it is entitled to know the basis for that position. Canal Barge further asserts that ComEd has not claimed this information is protected by privilege and has cited to no case law in support of its **[*6]** opposition to the topics.

[HN6] Generally, inquiry regarding a corporation's legal positions is appropriate in a *Rule 30(b)(6)* deposition. See *U.S. v. Taylor, 166 F.R.D. 356, 362 (M.D.N.C. 1996)*. However, some inquiries are better answered through "contention interrogatories" when the questions involve complicated legal issues. See *Taylor, 166 F.R.D. at 362 n.7*. Whether a *Rule 30(b)(6)* deposition or a *Rule 33(c)* contention interrogatory is more appropriate will be a case by case factual determination. Id. The Court finds in this case that there is both a legal and factual component to the interpretation of these contracts, and that Canal Barge's quite fact-specific inquiries into ComEd's position that the work performed on the barges was not maintenance are more appropriately posed in a *Rule 30(b)(6)* deposition rather than through contention interrogatories. Furthermore, Canal Barge is correct that ComEd has not asserted any privilege relating to any questions regarding it's "legal defenses" to the contracts.

ComEd's second general objection asserts that any inquiries by Canal Barge into the useful life of the barges (Topics 7,8, and 11) would require **[*7]** ComEd's designee to review more than 600 documents and would therefore be unduly burdensome. Canal Barge responds by saying that it is *ComEd* who has put the useful life of the barges at issue by seeking discovery from Canal Barge on this topic. (See Canal Barge's Resp. at 9.) [HN7] A corporation cannot "have [its] attorney assert that the facts show a particular position on a topic when, at the *Rule 30(b)(6)* deposition, the corporation asserts no

knowledge and no position." *Taylor, 166 F.R.D. at 363 n.8.* The Court finds that if ComEd wishes to introduce evidence and take a particular position regarding the useful life of the barges at trial, then it must submit to questioning regarding that position at the *Rule 30(b)(6)* deposition, and be prepared to discuss any documents relevant to that position.

ComEd raises one further objection to the topics named by Canal Barge for the *Rule 30(b)(6)* deposition. ComEd states in its motion to quash (and attaches a supporting affidavit to this effect) that many of its most knowledgeable employees on these topics now work for Midwest Generation, with which ComEd is having a legal dispute. Therefore, ComEd argues, it is unable **[*8]** to designate any of these former employees, who have personal knowledge of these topics, as its representative. Canal Barge responds that there are certain former employees who may be knowledgeable about these matters who do not work for Midwest Generation, namely Roland Kraatz, George Rifakes, or James Small. Most importantly, Canal Barge points out that even if none of these employees could testify, ComEd still has a duty to designate a representative who has knowledge on these topics, even if the employee has no personal knowledge and has to be educated. The Court agrees that "[HN8] if none of defendant's current employees has sufficient knowledge to provide plaintiffs with the requested information, defendant is obligated to 'prepare [one or more witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation.'" *Ierardi v. Lorillard, Inc., 1991 U.S. Dist. LEXIS 11320*, *3, 1991 WL 158911, at *1 (E.D. Penn. Aug. 13, 1991) (citing *Marker v. Union Fidelity. Life Ins. Co., 125 F.R.D. 121, 126 (M.D.N.C. 1989)).*

The Court finds that all of the topics listed by Canal Barge for its *Rule 30(b)(6)* deposition are appropriate, and therefore, DENIES ComEd's **[*9]** Motion to Quash.

III. Canal Barge's Motion to Strike Notices of *Rule 30(b)(6)* Depositions and Riders Attached to Notices of Depositions

On May 29, 2001, ComEd served six notices of deposition on Canal Barge pursuant to *Rule 30(b)(6)*. A rider was attached to each notice requesting Canal Barge to produce documents contained within eleven separate categories. In this motion, Canal Barge requests that, since it plans only to produce one witness to testify as to all of the barges, ComEd be limited to only one single day of deposition testimony. Canal Barge also requests that the Court strike the riders requesting further documents as untimely requests for production of documents pursuant to *Federal Rule of Civil Procedure 34.*

A. Canal Barge's Request to Limit the *Rule 30(b)(6)* Deposition to One Day

Canal Barge's first request that ComEd's *Rule 30(b)(6)* deposition be limited to one seven-hour day is based upon *Rule 30(d)(2)* which limits the deposition of each witness to one day of seven hours. [HN9] Under the Advisory Committee's Notes to *Rule 30(d)(2)*, if a corporation designates more than one representative in response to a deposition notice under *Rule 30(b)(6)*, the one **[*10]** day limit applies separately to each designee. *Fed. R. Civ. P. 30(d)(2)* advisory committee's notes. Canal Barge argues that when a party only designates one witness under *Rule 30(b)(6)*, a party should not be able to circumvent the one witness, one day limit by issuing multiple notices covering the same subject matter. In Response, ComEd notes that the notices do not cover the same subject matter, in that the repair performed on each barge was unique, and requires individualized inquiry. Come argues that "it is unreasonable to limit ComEd to ask detailed questions of the work done on 56 barges in one 7-hour time period." (ComEd's Resp. at 3.)

In this case, as Canal Barge only plans to designate one witness to respond to all questions regarding the repair work on the barges, *Rule 30(d)(2)*'s one-day time restriction does apply. However, [HN10] the language of *Rule 30(d)(2)* limits a deposition to one day of seven hours, "unless otherwise authorized by the court or stipulated by the parties." The Advisory Committee's Notes to *Rule 30(d)(2)* contemplate various factors a court may consider in determining whether to order an extension, including the need for an interpreter, if the examination will **[*11]** cover events occurring over a long period of time, if the witness will be questioned about numerous lengthy documents, or in multi-party cases. *Fed. R. Civ. P. 30(d)(2)* advisory committee notes. In this case, the Court finds that the factual complexity of discussing repair work performed on 56 barges and the need to refer to numerous accompanying documents justifies authorization to extend the time allowed for this deposition.

However, while the Court agrees with ComEd that the scope of this *Rule 30(b)(6)* deposition requires more

than one day of questioning, it finds ComEd's request for six days to be excessive. ComEd has not provided the Court with any case authority for its argument that it can simply serve six separate notices of deposition under *Rule 30(b)(6)* and be automatically entitled to six full days of depositions regardless of the number of corporate representatives designated by Canal Barge. As Canal Barge points out in its Reply, the solution to the problem lies in requiring ComEd to make efficient use of its time. The Court finds that allowing ComEd up to three seven hour days in which to conduct its *Rule 30(b)(6)* deposition provides a compromise which allows ComEd ample **[*12]** time to question Canal Barge's designee regarding the repair work performed on the barges, while requiring ComEd to use its time in an efficient manner. Therefore, the Court is authorizing ComEd to use up to three seven hours days in its *Rule 30(b)(6)* deposition of Canal Barge, and Canal Barge's motion to strike this deposition in its entirely is denied.

B. Canal Barge's Request for the Court to Strike the Riders Attached to the Notices of Deposition

Canal Barge's second request is for the Court to strike all of the riders which ask for Canal Barge to produce numerous documents to ComEd at the depositions. ComEd attaches these riders pursuant to *Rule 30(b)(5)*, which states: "[HN11] The notice of a party deponent may be accompanied by a request made in compliance with *Rule 34* for the production of documents and tangible things at the taking of the deposition. The procedure of *Rule 34* shall apply to the request." *Fed. R. Civ. P. 30(b)(5)*. Canal Barge objects to producing these documents on the basis that written discovery closed on April 30, 2001, and that a *Rule 30(b)(5)* request for production of documents made after the close of written discovery violates the requirements of *Rule* **[*13]** *34*.

This Court follows the holding of *Carter v. United States, 164 F.R.D. 131 (D. Mass. 1995)*, referred to by both parties in their briefs. In Carter, the district court relied on language in the Advisory Committee's Notes to *Rule 30(b)(5)* [1] in coming to its holding that only the most narrow and relevant documents may be requested pursuant to *Rule 30(b)(5)*:

> In essence, [HN12] a document request under *Rule 30(b)(5)* is a complement to a *Rule 30* deposition, not a substitute for a *Rule 34* document request. . . . Thus, . . . requests which fall under the rubric of a *Rule 30(b)(5)* deposition should be "few and simple" and "closely related to the oral examination" sought. Otherwise, the Court may assume that the document request falls under *Rule 34* and, as such, is barred as untimely under the Court's scheduling order.

Id. at 133.

> 1 The Advisory Committee's Notes state: "[HN13] Whether production of documents or things should be obtained directly under *Rule 34* or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via *Rule 34* alone." *Fed. R. Civ. P. 30(b)(5)* advisory committee's notes.

[*14] The riders at issue ask for broad categories of written documents, many of which are unlimited in time and would include documents generated during the entire thirty-year duration of the contract. (See Canal Barge's Reply at 6.) The Court finds that these document requests are neither "few and simple" nor "closely related to the oral examination sought." Canal Barge asserts that many of the requested documents have previously been produced to ComEd, [2] and this Court finds that Canal Barge is not required bring any documents to the deposition which it has already produced to ComEd. To the extent the riders solicit production of new documents which were not previously requested, or which were included in ComEd's additional proposed interrogatories which were rejected by this Court, the Court finds that these requests are untimely in light of the written discovery cut-off date of April 30, 2001.

> 2 Neither party clarifies which documents contained within the Rider Requests have previously been requested and produced and which have not. Therefore, the Court makes no

findings as to which documents within the Rider Requests Canal Barge has already produced.

[*15] Therefore, Canal Barge's motion to strike the riders attached to notices of depositions is granted. However, the Court will require that Canal Barge bring with it to the deposition any documents, not previously produced to ComEd, which the designee relied upon in preparing for the deposition.

IV. Conclusion

For the foregoing reasons, the Court finds that ComEd's Motion to Quash Notice of Deposition, (Docket Entry # 73), is DENIED and Canal Barge's Motion to Strike Notices of *Rule 30(b)(6)* Depositions and Riders Attached to Notices of Depositions, (Docket Entry # 71), is GRANTED in part and DENIED in part.

ENTER:

Nan R. Nolan

United States Magistrate Judge

Dated:

July 18, 2001

LEXSEE 2007 US DIST LEXIS 39247

JERRY HARRIS, Plaintiff, v. EURONET WORLDWIDE, INC. and PAYSPOT, INC., Defendants.

Case No. 06-2537-JTM-DWB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2007 U.S. Dist. LEXIS 39247

May 29, 2007, Decided
May 29, 2007, Filed

CORE TERMS: mediation, deposition, protective order, depose, opposing counsel, citations omitted, good cause, preparation, mediator, session, order prohibiting, confidential information, attorney's fees, expenses incurred, extraordinary circumstances, own admission, substantially justified, nonprivileged, confidential, discoverable, corroborate, protective, attendance, quotations, deposed, terminated, attended

COUNSEL: [*1] For Jerry Harris, Plaintiff: Brendan J. Donelon, LEAD ATTORNEY, DONELON, P.C., Kansas City, MO.

For Euronet Worldwide, Inc., Payspot, Inc., Defendants: Kenneth M. Willner, LEAD ATTORNEY, Brendan M. Branon, Paul, Hastings, Janofsky & Walker, LLP -- Washington, Washington, DC; Michael A. Williams, LEAD ATTORNEY, Lathrop & Gage, LC - KC, Kansas City, MO.

JUDGES: DONALD W. BOSTWICK, United States Magistrate Judge.

OPINION BY: DONALD W. BOSTWICK

OPINION

MEMORANDUM AND ORDER

Before the Court is Plaintiff's Motion for a Protective Order "pertaining to Defendants' attempt to depose Plaintiff's counsel Brendan J. Donelon and the confidential nature of a mediation sesion [sic]." (Doc. 15). Defendant has responded in opposition to the motion. (Doc. 20.) Plaintiff did not reply and the time to do so has expired. *See* ***D.Kan. Rules 6.1, 7.4.*** The Court has reviewed the briefs and exhibits provided by counsel and is prepared to rule.

BACKGROUND

Plaintiff filed suit against Defendant Euronet claiming employment retaliation in violation of Title VII. (Doc. 1.) Plaintiff contends her employment was terminated after she was identified as witness willing to testify on behalf of Darrel [*2] Matthews, another of Defendant's employees, who was bringing a racial discrimination claim against the company. *Id.* This alleged identification occurred during a mediation of Matthews' claims on December 20, 2005. Plaintiff's employment with Defendants was terminated on January 9, 2006. (*See* Doc. 1 at PP 20-21.)

The mediation at issue was attended by two of Defendants' Human Resources employees in addition to Matthews and his attorney, Brendan Donelon. Mr. Donelon also represents Plaintiff in the present case. Plaintiff alleges that during a joint session of Matthews' mediation, Matthews indicated Plaintiff would testify that "he did his job well" and "was replaced by a Phil Hackley (a Caucasian)." (Doc. 15 at pg. 2.) Plaintiff further alleges that Donelon "made no comments regarding Matthews' statements about [Plaintiff] except a confirmation comment regarding their validity." *Id.* According to Defendants, both of their employees who attended the mediation have stated that "Plaintiff was not mentioned by anyone" at the mediation, "contrary to Mr. Matthews' allegations, and . . . their notes of the mediation session do not indicate that Plaintiff was mentioned." (Doc. [*3]

20, at pg. 2-3.)

On March 1, 2007, Defendants noticed the deposition of Donelon in order to question him regarding the statements allegedly made by Matthews at the

mediation "identifying Plaintiff as a witness in support of Mr. Matthews' claims of racial discrimination." (Doc. 20 at pg. 3.) According to Defendants, "[t]hese alleged statements are central to Plaintiff's theory of her case" and "crucial to the preparation of Defendants' case." *Id.*

DISCUSSION

A. Deposition of Plaintiff's Attorney Brendan Donelon.

Fed. R. Civ. P. 26(c) provides that the Court may, upon a showing of good cause, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Trial courts have discretion in determining when a protective order is appropriate. *See* ***Boughton v. Cotter Corp.,*** *65 F.3d 823, 828 (10th Cir. 1995)* (stating that a trial judge's grant of a protective order will be reviewed for abuse of discretion).

The party seeking a protective order has the burden to show good cause for it. ***Reed v. Bennett,*** *193 F.R.D. 689, 691 (D. Kan. 2000).* **[*4]** To establish good cause, that party must make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." ***Pepsi-Cola Bottling Co. of Pittsburgh, Inc. v. Pepsico, Inc.,*** *Case No. 01-2009, 2002 U.S. Dist. LEXIS 8134, 2002 WL 922082, at *1 (D. Kan. May 2, 2002)* (quotations and citations omitted). While the Court may grant a protective order prohibiting the taking of a deposition when it believes that the information sought is wholly irrelevant to the issues in the case, the normal practice of this Court is to deny motions that seek to entirely bar the taking of a deposition. ***Horsewood v. Kids "R" Us,*** *Case No. 97-2441, 1998 U.S. Dist. LEXIS 13108, 1998 WL 526589, at *5 (D. Kan. Aug. 13, 1998).*

Attorneys are subject to being deposed, even if they represent a party to the suit. ***Simmons Foods, Inc. v. Willis,*** *191 F.R.D. 625, 630 (D. Kan. 2000)* (citations omitted); *see also* ***United Phosphorus, Ltd. v. Midland Fumigant, Inc.,*** *164 F.R.D. 245, 248 (D. Kan. 1995)* ("Attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery by **[*5]** virtue of their license to practice law or their employment by a party."). "Barring extraordinary circumstances, courts rarely will grant a protective order which totally prohibits a deposition." ***Simmons Foods,*** *191 F.R.D. at 630* (citations omitted). However, extraordinary circumstances may be presented when one party seeks to depose opposing counsel, including "delay, disruption of the case, harassment, and unnecessary distractions into collateral matters." *Id.* (citations and quotations omitted).

With similar considerations in mind, the Eighth Circuit established a threshold three part test for determining when a party should be allowed to depose opposing counsel. ***Shelton v. Am. Motors Corp.,*** *805 F.2d 1323, 1327 (8th Cir. 1986).* That test requires the party seeking the deposition to show that "(1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case." *Id.* (citations omitted).

Faced with the same issue, the Tenth Circuit recognized the ***Shelton*** factors, stating

> [T]he **[*6]** question is whether the trial court abused its discretion in attempting to protect the defendants from an unnecessary burden. Viewed in this light we approve the criteria set forth in *Shelton v. American Motors, supra,* but at this time, we need only make the more limited holding that ordinarily the trial court at least has the *discretion* under *Rule 26(c)* to issue a protective order against the deposition of opposing counsel when any one or more of the three *Shelton* criteria for deposition listed above are not met.

Boughton, *65 F.3d at 830* (emphasis in original). The Tenth Circuit did not set out a mandatory test, but essentially created a *per se* rule that if a party seeking to depose opposing counsel could not meet the ***Shelton*** test, then it was within the trial court's discretion to issue a protective order prohibiting such deposition. The court did not hold that the test was requisite in determining whether an attorney may be deposed, and not all courts have applied it. *See* ***United Phosphorus,*** *164 F.R.D. at*

248 (stating that the ***Boughton*** decision "does not suggest that the [[*7] ***Shelton*** factors] must be applied in every case in which the opposing counsel's deposition is sought"). ***Boughton*** is not a restriction on the Court's discretion under *Rule 26(c)*, but rather is an indicator of the scope of such discretion. In this Court's opinion, however, the analysis and factors enumerated in ***Shelton*** are highly relevant to an analysis of the present situation.

In the context of the first ***Shelton*** factor -- that "no other means exist to obtain the information than to depose opposing counsel" -- Defendants argue that Donelon is "the only other person in attendance besides the mediator" who will be able to corroborate Matthews' alleged statements regarding Plaintiff. (Doc. 20 at pg. 5.) Defendants further argue that they are prohibited from deposing the mediator as a result of the mediation agreement, thus "Mr. Donelon is the only remaining witness on this subject." *Id.* Therefore, according to Defendants, they have no other means to obtain this information.

Simply stated, the Court does not agree with Defendants' analysis. The ***Shelton*** factors clearly state that there must be "no other means . . . to obtain the information [*8] than to depose opposing counsel." *805 F.2d at 1327*. By Defendants' own admission, however, two of its employees were in attendance at the mediation session at issue. Although Mr. Donelon may be the only person remaining who can *corroborate* Mr. Matthews' statements, [1] he is not the only person who can testify as to what Mr. Matthews did or did not say at the mediation. Thus, Mr. Donelon is not the only means available to obtain the information at issue. Because Defendants have failed to establish the first ***Shelton*** factor, the Court need not address whether the information is relevant, nonprivileged, and/or crucial to Defendants' preparation of the case. [2] ***Boughton,*** *65 F.3d at 830* (holding that the Court has the discretion under *Rule 26(c)* "to issue a protective order against the deposition of opposing counsel when any one or more of the three ***Shelton*** criteria . . . are not met"). Plaintiff's Motion for Protective Order is, therefore, **GRANTED.** [3]

1 The Court has not been asked, and will not address, whether it would be possible to depose the mediator. The Court does note, however, that since both Mr. Matthews and Defendant Euronet have commented on what was said, or not said, at the prior mediation, an argument could be made that any claim of confidentiality has been waived by both parties. Also, some mediation rules specifically provide that confidential information from a mediation may be used in limited circumstances in future proceedings. *See, e.g.,* D.Kan. Rule 16.3(i)(3)(i) (stating that confidential information may be disclosed if necessary to prevent a manifest injustice, help establish a violation of law or ethical violation, or prevent harm to the public health or safety).

[*9]

2 Defendants urge that Donelon's testimony is crucial to the case and also indicate that they should be entitled to depose him to ascertain whether there is a factual basis to seek his disqualification. (Doc. 20 at 3, n.2 and 7-8.) Here Defendants know the substance of Donelon's knowledge from statements he made in the Motion for Protective Order. Those statements were made as an officer of the Court and adequately outline his involvement to allow Defendants to pursue a motion to disqualify if they believe they have adequate legal grounds to do so.

3 Plaintiff also states that "[a]n additional issue that ***may*** arise in this matter, and require the Court's intervention, is the mediation setting" and whether "conversations and comments" occurring therein are confidential or discoverable. (Doc. 15 at pg. 4 (emphasis added).) By Plaintiff's own admission, this issue has not yet ripened, but ***may*** require the Court's intervention at some undisclosed point in the future. Further, Defendants have indicated they intend to file a Motion in *Limine* on the issue. (Doc. 20 at pg. 7.) A determination of this issue is not relevant or necessary in the context of the Court's ruling on Plaintiff's Motion for Protective Order. The Court, therefore, will not address this issue at this time.

[*10] B. Request for Attorneys' Fees.

Plaintiff has requested costs and fees incurred in drafting this motion. *Rule 26(c)* states that the provisions of *Rule 37(a)(4)* apply concerning the award of expenses incurred in connection with such a motion. *Rule 37(a)(4)(A)* provides that "the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in making

the motion, including attorney's fees" unless it finds that Defendants' actions were "substantially justified or that other circumstances make an award of expenses unjust."

In this case, the Court believes that Defendants were substantially justified in attempting to depose Mr. Donelon. Although Mr. Donelon is not the only individual with information regarding the statements at issue, the fact remains that he was present at the mediation and, therefore, may have some recollection of what was or was not said about Plaintiff. Thus, it would not be just to award costs or fees to Plaintiff. The Court therefore finds that the parties should bear their own costs and expenses in connection with this motion.

[*11] CONCLUSION

Plaintiff's Motion for Protective Order regarding the deposition of Brendan Donelon (Doc. 15) is GRANTED. Thus, Defendants shall not be allowed to depose Plaintiff's counsel, Mr. Donelon, regarding what occurred at the December 20, 2005, mediation at issue. Plaintiff's request for her costs and fees concerning the motion is DENIED.

IT IS SO ORDERED.

Dated at Wichita, Kansas on this 29<th> day of May, 2007.

s/ DONALD W. BOSTWICK

United States Magistrate Judge

LEXSEE 2007 U.S. APP. LEXIS 19015

ECCLESIASTES 9:10-11-12, INC., Plaintiff-Appellant, and DELOREAN MANUFACTURING COMPANY; CRISTINA CORPORATION; JOHN Z. DELOREAN, Plaintiffs, v. LMC HOLDING COMPANY; LMC OPERATING CORPORATION; LMC TENANT CORPORATION; PAUL WALLACE; LAWRENCE LOPATER, Defendants-Appellees.

No. 05-4192

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2007 U.S. App. LEXIS 19015

August 10, 2007, Filed

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the District of Utah. (No. 1:95-CV-3-TS).

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, corporation, its affiliated corporations, and its sole director, sued appellees, holding company, its subsidiaries, and its officers, and alleged claims for, inter alia, breach of contract, common law fraud, fraud-in-the-inducement, and securities fraud. The United States District Court for the District of Utah dismissed the action with prejudice for failure to prosecute pursuant to *Fed. R. Civ. P. 41(b)*. The corporation appealed.

OVERVIEW: The district court dismissed the case as a sanction for the alleged discovery-related dilatoriness of the company. The alleged delay allegedly precluded the parties from preserving the deposition testimony of the director prior to his death. The appellate court found that the district court did not abuse its discretion when it granted the motion for dismissal pursuant to *Fed. R. Civ. P. 41(b)* for failure to prosecute because: (1) the loss of the sole director's deposition testimony, the product of the corporation's dilatoriness, actually prejudiced the company since to establish its counterclaims, it needed to depose the director; (2) the corporation's conduct involved more than a simple discovery dispute over *Fed. R. Civ. P. 30(b)(6)* designations, and the court could not conclude that the corporation acted in good faith; (3) as a consequence of the corporation's "willful effort" to avoid the director's *Fed. R. Civ. P. 30(b)(6)* deposition, his critical testimony was not preserved; (4) the corporation was warned of the possibility of dismissal; and (5) dismissal was the only appropriate remedy due to the incurable loss of the director's unique and critical testimony.

OUTCOME: The judgment of the district court was affirmed.

CORE TERMS: notice, deposition, discovery, designation, designee, designate, constructive notice, purchase-price, counterclaims, designated, misconduct, venue, prong, manufacturing, responsive, ambiguous, dispatch, withdrew, documentation, failure to prosecute, managing agent, fraudulent, purported, deponent, warning, depose, willful, closing-date, deposition testimony, discovery dispute

LexisNexis(R) Headnotes

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN1] An appellate court has jurisdiction under *28 U.S.C.S. § 1291* to review a district court's order of dismissal pursuant to *Fed. R. Civ. P. 41(b)*.

Civil Procedure > Discovery > Motions to Compel
[HN2] See *Fed. R. Civ. P. 37(b)(2)*.

Civil Procedure > Appeals > Reviewability > Preservation for Review
[HN3] An issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling. An appellate court will not consider a new theory advanced for the first time as an appellate issue, even a theory that is related to one that was presented to the district court. Nor does the vague and ambiguous presentation of a theory before the trial court preserve that theory as an appellate issue.

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
[HN4] An appellate court reviews for an abuse of discretion a district court's decision to dismiss an action for failure to prosecute. An abuse of discretion occurs when a district court makes a clear error of judgment or exceeds the bounds of permissible choice in the circumstances. That occurs when a district court relies upon an erroneous conclusion of law or upon clearly erroneous findings of fact.

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to Prosecute
[HN5] *Fed. R. Civ. P. 41(b)* states, for failure of the plaintiff to prosecute or to comply with those rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. The sanction of dismissal with prejudice for failure to prosecute is a severe sanction, a measure of last resort.

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
[HN6] The United States Court of Appeals for the Tenth Circuit has identified a non-exhaustive list of factors that a district court ordinarily should consider in determining whether to dismiss an action with prejudice under *Fed. R. Civ. P. 41(b)*: (1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. Under that flexible framework, dismissal is warranted when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN7] The law is well-settled that corporations have an affirmative duty to make available as many persons as necessary to give complete, knowledgeable, and binding answers on the corporation's behalf. *Fed. R. Civ. P. 30(b)(6)*. That duty is not negated by a corporation's alleged lack of control over potential *Fed. R. Civ. P. 30(b)(6)* deponents. *Fed. R. Civ. P. 30(b)(6)* places the burden of identifying responsive witness for corporate deposition on the corporation.

Civil Procedure > Discovery > Methods > Oral Depositions
[HN8] The 1970 amendments to *Fed. R. Civ. P. 30* expressly removed the previous distinction between directors, on one hand, and managing agents and officers, on the other; a corporation now is deemed to have legal control over its directors, like its managing agents and officers, for deposition purposes.

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
[HN9] Notice is not a prerequisite for dismissal under *Fed. R. Civ. P. 41(b)*.

COUNSEL: Reid Lambert, Woodbury & Kesler, Salt Lake City, UT, (Edgar Boles, Moriarty & Jaros, PLL, Pepper Pike, Ohio, with him on the brief), for Plaintiff-Appellant.

Christopher Johnson, Kasowitz, Benson, Torres & Friedman, LLP, New York City, NY, (Wayne G. Petty, Moyle & Draper, Salt Lake City, UT, with him on the briefs), for Defendants-Appellees.

JUDGES: Before BRISCOE, HOLLOWAY, and HOLMES, Circuit Judges.

OPINION BY: HOLMES

OPINION

HOLMES, Circuit Judge.

This appeal challenges the district court's decision to dismiss this action with prejudice for failure to prosecute pursuant to *Fed. R. Civ. P. 41(b)*. The district court dismissed this case, which originally was commenced in 1995, as a sanction for the alleged discovery-related dilatoriness of appellant Ecclesiastes 9:10-11-12, Inc. ("Ecclesiastes"). This delay allegedly precluded the parties from preserving the deposition testimony of John Z. DeLorean prior to his death. At times material to the dismissal, DeLorean was Ecclesiastes's sole director, its corporate designee pursuant to *Fed. R. Civ. P. 30(b)(6)*, and Ecclesiastes's only witness with first-hand knowledge of the factual **[*2]** underpinnings of the litigation.

We hold that the district court did not abuse its discretion in granting defendants' motion for dismissal pursuant to *Rule 41(b)*. Thus, we **AFFIRM** the district court's judgment.

I. BACKGROUND

A. Asset Purchase Agreement

On December 2, 1992, DeLorean and three corporations he directly and indirectly controlled, Logan Manufacturing Company ("Logan"), [1] DeLorean Manufacturing Company ("DeLorean Manufacturing"), and Cristina Corp. ("Cristina") (collectively "plaintiffs"), entered into an asset purchase agreement ("APA") with LMC Holding Co. ("LMC Holding") for the sale of plaintiffs' snow-grooming equipment business. [2] Paul Wallace specifically formed LMC Holding to acquire plaintiffs' assets. DeLorean and Wallace negotiated the terms of the APA.

1 After the execution of the APA, Logan changed its name to Ecclesiastes. We use the name Ecclesiastes throughout this opinion to refer to this corporate entity, both before and after its name change.

2 DeLorean was the sole shareholder of Cristina, which was the sole shareholder of DeLorean Manufacturing, which was the sole shareholder of Ecclesiastes.

Pursuant to the APA, LMC Holding was to pay a purchase price of $ 12,750,000, **[*3]** subject to certain closing and post-closing "adjustments" (the "purchase-price adjustments"). The APA placed responsibility on plaintiffs for producing the necessary financial documentation to calculate the purchase-price adjustments. This included audited financial statements for the fiscal year that ended on November 30, 1992. Because closing took place after December 1, 1992, plaintiffs also were responsible for furnishing the following documents within 77 days of closing: (1) a balance sheet, a statement of operations, retained earnings and cash-flow statements, and inventory assessments for the new fiscal year through the closing date ("closing-date documentation"); (2) a report from plaintiffs' independent accountant, KPMG Peat Marwick ("KPMG"), containing the results of its audit of this closing-date documentation; and (3) plaintiffs' computation of the purchase-price adjustments based upon the audited closing-date documentation. Thereafter, the parties would make arrangements for the transaction's final payment.

DeLorean was plaintiffs' sole representative at the January 5, 1993 closing. At closing, plaintiffs transferred their assets to LMC Holding, which, in response, paid **[*4]** plaintiffs $ 4,900,000 in cash, provided them with a promissory note for $ 850,000, and transferred to an escrow agent other notes and shares of preferred stock. Seventy-seven days later, however, plaintiffs did not deliver to defendants the closing-date documentation and their related calculation of the purchase-price adjustments, as contemplated by the APA.

The closing-date documentation was never completed. Nevertheless, DeLorean apparently attempted to negotiate the purchase-price adjustments with defendants, offering a variety of seemingly contradictory methodologies and calculations to conclude the agreement. Ultimately, defendants tendered no additional payment.

B. Pleadings

In January 1995, Ecclesiastes filed a complaint against LMC Holding and Wallace. On March 24, 1995, an amended complaint was filed, and DeLorean, DeLorean Manufacturing, and Cristina were added as plaintiffs. The amended complaint named LMC Holding, LMC Operating Corporation ("LMC Operating"), [3] LMC Tenant Corporation ("LMC Tenant"), [4] Lawrence Lopater, [5] and Wallace as defendants (collectively "defendants"). A second amended complaint was filed on December 15, 1995.

3 LMC Operating is a wholly-owned subsidiary **[*5]** of LMC Holding; it was formed to assume

ownership of and to operate the manufacturing business purchased by LMC Holding.

4 LMC Tenant Corporation is a wholly-owned subsidiary of LMC Holding; it was formed to lease the real property of the manufacturing business purchased by LMC Holding and then to sublease the real property to LMC Operating.

5 Lopater was an officer of LMC Holding, LMC Operating, and LMC Tenant.

Plaintiffs brought claims for, *inter alia*, breach of contract, common law fraud, fraud-in-the-inducement, securities fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961 et seq.* Plaintiffs alleged that Wallace perpetrated a fraudulent scheme to induce DeLorean to enter into the APA. According to plaintiffs, defendants further perpetrated this scheme after the January 5, 1993 closing by impermissibly dissipating Ecclesiastes's assets to avoid satisfying defendants' financial obligations to plaintiffs, by demanding fraudulent offsets to the balance of the purchase price, and by preventing plaintiffs from accessing the business premises and the requisite records to calculate the purchase-price adjustments.

Plaintiffs' claims placed **[*6]** DeLorean at the center of the litigation. According to the second amended complaint, DeLorean negotiated the APA, misunderstood the terms of this purposefully "ambiguous and confusing" contract, was misled by the methodology for calculating the purchase-price adjustments, and personally participated in the "purported closing." App. at 40, 47.

In response, defendants filed an array of counterclaims, including claims for breach of contract, fraud-in-the-inducement, and negligent misrepresentation. Defendants asserted that DeLorean made several fraudulent representations to induce them to enter into the APA. Defendants specifically alleged the following: after closing, defendants discovered that Ecclesiastes's inventory of machines, parts, and supplies was both inadequate and obsolete; plaintiffs inflated the sales and revenue figures; Ecclesiastes's machines yielded significant undisclosed warranty liabilities due to defective design; and plaintiffs failed to make contributions to Ecclesiastes's pension plan and never discontinued its pension plan.

C. Discovery

DeLorean declared personal bankruptcy in September 1999. Approximately seven months later, LMC Operating filed for bankruptcy. **[*7]** On February 26, 2001, following these bankruptcy filings, the district court administratively closed the action. Little discovery had been completed at that point.

On November 4, 2002, plaintiffs moved to re-open the case and to dismiss the bankrupt parties. Plaintiffs filed a memorandum in support of this motion on July 10, 2003. On September 15, 2003, defendants filed a *Rule 41(b)* motion to dismiss the action for failure to prosecute, arguing that plaintiffs inexcusably failed both to advance the litigation in the years prior to the administrative closure of the action and to proceed against the remaining defendants while the case against LMC Operating was stayed in accordance with bankruptcy law. On March 10, 2004, the district court granted plaintiffs' motion to re-open the case and to dismiss the bankrupt parties, including DeLorean. Despite denying defendants' motion to dismiss the action pursuant to *Rule 41(b)*, the district court warned that sanctions may be appropriate upon proof of the loss of evidence, and orally directed the parties "to proceed in this case with all dispatch." App. at 1106.

On March 19, 2004, defendants served Ecclesiastes with a notice of deposition pursuant **[*8]** to *Fed. R. Civ. P. 30(b)(6)*. The *Rule 30(b)(6)* notice identified April 20, 2004 as the date for the deposition of Ecclesiastes's corporate designee. Defendants sought to depose Ecclesiastes's corporate designee on a number of issues, including: the negotiation, content, execution, and performance of the APA; the preparation, accuracy, and GAAP-conformity of Ecclesiastes's financial statements between January 1, 1990 and January 5, 1995; communications between Ecclesiastes and Ecclesiastes's auditors/accountants between January 1, 1992 and the date of the deposition; the calculation of the purchase price; and the allegations in plaintiffs' second amended complaint and defendants' counterclaims. By the time defendants served their *Rule 30(b)(6)* notice, ownership of Ecclesiastes had moved from DeLorean to his brother, Charles DeLorean, a creditor who acquired the interest in partial satisfaction of unpaid debts.

Shortly before the scheduled deposition, Ecclesiastes's counsel, Edgar Boles, asked defendants' counsel, Christopher Johnson, for a postponement. On May 6, 2004, defendants continued the deposition without scheduling a new date. Then, in a July 26, 2004

letter, Boles tendered three [*9] individuals for depositions, DeLorean and two former employees of Ecclesiastes, Bryce Patterson and Mel Mitchell. Boles did not expressly indicate whether the three were being designated as *Rule 30(b)(6)* deponents. The district court interpreted the July 26, 2004 letter as effecting the *Rule 30(b)(6)* designation of the three. In any event, in an October 15, 2004 letter, Boles left no room for doubt that the three were being provided "in response" to defendants' *Rule 30(b)(6)* notice. [6] App. at 546.

> 6 At best, the record as a whole is ambiguous concerning whether Ecclesiastes intended for its July 26 letter to be a designation under *Rule 30(b)(6)*, and whether defendants interpreted it as such. During oral argument, Ecclesiastes indicated that, in conversations with the defendants, it had put DeLorean forward as a *Rule 30(b)(6)* designee as early as April 2004 -- that is, approximately one month after service of the *Rule 30(b)(6)* notice. We have found nothing in the record to support that assertion and, consequently, do not rely upon it. Ultimately, we need not determine whether there is sufficient evidence in the record to support the district court's finding that July 26, 2004, as opposed [*10] to October 15, 2004, marked the date of Ecclesiastes's *Rule 30(b)(6)* designation. Whether the correct date is July 26, 2004 or October 15, 2004, it remains true that: (1) despite being under the district court's directive to act with "all dispatch," Ecclesiastes delayed for *at least four months* before making *Rule 30(b)(6)* designations; and (2) after allowing *over eight months* to elapse from the time defendants initially served it with their *Rule 30(b)(6)* notice, Ecclesiastes inexplicably withdrew its most logical -- indeed, irreplaceable -- *Rule 30(b)(6)* witness, DeLorean. As discussed further below, it is factors such as these that control the resolution of this appeal.

Between October 2004 and December 2, 2004, the parties engaged in discussions concerning the scheduling of depositions. The parties agreed to propose and confirm discovery dates prior to noticing depositions, due in part to the geographical distance between the parties and their respective counsel. Johnson sought without objection to depose DeLorean both in his personal and *Rule 30(b)(6)* capacities. Johnson sent approximately ten separate letters to Boles requesting that plaintiffs identify dates for the taking of depositions [*11] of Ecclesiastes's corporate designees, including DeLorean. Boles delayed in responding to defendants' requests, due in part to his absence from work for a family medical matter. On the three occasions when Boles did respond in writing, he never confirmed an exact date for DeLorean's deposition testimony.

Defendants took additional steps to secure DeLorean's testimony. On October 28, 2004, defendants moved to transfer venue to the United States District Court for the Southern District of New York. Defendants requested the change in venue to ensure that, if necessary, they could subpoena DeLorean's presence at trial pursuant to *Fed. R. Civ. P. 45(b)(2)*. Defendants labeled DeLorean as "probably the single most critical witness in this case." App. at 403.

On November 8, 2004, Boles withdrew Ecclesiastes's designation of two of its *Rule 30(b)(6)* deponents, Peterson and Mitchell, asserting that as former employees they could not serve as designees. On December 2, 2004, one day after receiving Johnson's tenth letter requesting a date for DeLorean's *Rule 30(b)(6)* deposition, Boles withdrew DeLorean's name, stating that he "cannot formally designate any witness under *Rule 30(b)(6)* or otherwise [*12] for, among other reasons, all such persons are third-party witnesses . . . . [and] none are under the direction and control of my client." App. at 585.

Defendants quickly filed a motion to compel and requested the costs of the motion as a sanction. Opposing defendants' motion to compel, Ecclesiastes argued that potential *Rule 30(b)(6)* witnesses "could not be compelled to appear and indeed, could not be 'designated[]' [because] [a]ll were third parties who were former employees." App. at 707. In contrast to this representation, Boles filed an affidavit stating that DeLorean is the "only remaining officer or director" of Ecclesiastes, and, as Ecclesiastes's sole representative at the time of the APA's execution, the only witness who could testify as to some of the subject areas in defendants' *Rule 30(b)(6)* notice. App. at 724.

On January 25, 2005, the district court held a hearing on the motion to transfer venue. Ecclesiastes's local counsel, Reid Lambert, agreed that DeLorean was vital to plaintiffs' claims, stating: "[A]s counsel accurately points out, Mr. DeLorean is essential to our case. It would be silly to think we could put on our case without him."

App. at 1046. In addition, **[*13]** Lambert represented that because DeLorean was still a corporate officer of Ecclesiastes, the district court would possess the authority to command his appearance at a trial in Utah:

> Mr. DeLorean is still affiliated with Ecclesiastes. I suppose it would be practicable for this Court under those circumstances to direct Ecclesiastes to default if they didn't produce him . . . .
>
> . . . .
>
> You know, I guess what I'm suggesting is this . . . . *I think in this case it is practical for this Court to say* Mr. DeLorean is an officer of your company, if you don't produce him--you know, you are the company, you are the officers, you're the director, I guess you would say, *if you don't produce him, I'm going to default you.*

App. at 1044-45 (emphasis added).

The district court found that DeLorean's presence at trial was "absolutely essential[]," but held its ruling on the motion to transfer in abeyance pending consideration of whether DeLorean's presence could be guaranteed. App. at 1049, 1052-53. On February 3, 2005, Ecclesiastes filed a statement with the district court agreeing that if DeLorean "fails to appear in person as a witness at trial, absent compelling health-related reasons satisfactory to **[*14]** the Court, the Court may dismiss Ecclesiastes' claims with prejudice." App. at 796. Defendants objected to this statement, contending that Ecclesiastes knew of DeLorean's advanced age and poor health for several years and should therefore "bear any and all risks if Mr. DeLorean is unable to attend the trial **for whatever reason**." App. at 801.

On March 19, 2005, DeLorean died. Defendants renewed their *Rule 41(b)* motion to dismiss for failure to prosecute and advised the district court that their pending motion to transfer venue was moot. The district court admonished Ecclesiastes's counsel to take the motion "serious[ly]." App. at 982. On May 24, 2005, following oral argument, the district court granted defendants' motion and dismissed the entire action with prejudice as to all plaintiffs. This ruling was later embodied in a written order, dated June 15, 2005. The district court acknowledged that dismissal should be a measure of last resort, but reasoned that the five-factor test of *Ehrenhaus v. Reynolds, 965 F.2d 916 (10th Cir. 1992)*, mandated this outcome. Only Ecclesiastes appeals the judgment.

II. DISCUSSION

[HN1] This Court has jurisdiction under *28 U.S.C. § 1291* to review the district court's **[*15]** order of dismissal pursuant to *Rule 41(b)*. Ecclesiastes asserts that the district court erred in two ways. First, Ecclesiastes argues that the district court wrongly applied *Rule 41(b)* to a discovery dispute that falls exclusively within the ambit of *Fed. R. Civ. P. 37*. Second, Ecclesiastes argues that, even if *Rule 41(b)* is applicable, the district court failed to apply correctly the factors for involuntary dismissal.

A. Applicability of *Rule 41(b)*

Ecclesiastes argues that the district court committed a fundamental error by using *Rule 41(b)* to dismiss the action under a failure-to-prosecute theory. Relying upon *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197, 207, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)*, Ecclesiastes contends that, due to the extreme consequences of dismissal, disputes regarding the production of discovery must be exclusively resolved under *Rule 37*. Because Ecclesiastes never violated an order "to provide or permit discovery" within the meaning of *Rule 37(b)(2)*, [7] it reasons that the district court lacked authorization to dismiss the action. [8]

> 7 In pertinent part, *Rule 37(b)(2)* reads as follows:
>
> > [HN2] If a party or an officer, director, or managing agent **[*16]** of a party or a person designated under *Rule 30(b)(6)* or *31(a)* to testify on behalf of a party fails to obey *an order to provide or permit discovery* . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> >
> > . . . .

> (C) *An order . . . dismissing the action or proceeding*, or any part thereof, or rendering a judgment by default against the disobedient party[.]

Fed. R. Civ. P. 37(b)(2) (emphasis added).

8 Inherent in Ecclesiastes's argument is the contention that the district court should have resolved defendants' arguments under the framework of *Rule 37(a)*, which permits a motion to compel upon a failure "to make a designation under *Rule 30(b)(6)*," and which prescribes the sanction of reasonable expenses, but *not* dismissal, upon the granting of a *Rule 37(a)* motion. *Fed. R. Civ. P. 37(a)(2)(B), (a)(4)*; *see, e.g.*, Aplt. Reply Br. at 2-3 ("Ecclesiastes contends that the entire issue . . . should have been addressed as a discovery dispute pursuant to *Fed. R. Civ. P. 37*. Since the sanction of dismissal would not have been available thereunder, dismissal was inappropriate and the matter should be reversed.").

In response, **[*17]** defendants argue that Ecclesiastes forfeited this argument by failing to raise it before the trial court. We agree.

[HN3] An issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling. *See, e.g., Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp., 315 F.3d 1271, 1278 (10th Cir. 2003)*. This Court will not consider a new theory advanced for the first time as an appellate issue, even a theory that is related to one that was presented to the district court. *See, e.g., Hiner v. Deere & Co., 340 F.3d 1190, 1196 (10th Cir. 2003)*. Nor does the "vague and ambiguous" presentation of a theory before the trial court preserve that theory as an appellate issue. *Okland Oil Co. v. Conoco, Inc., 144 F.3d 1308, 1314 n.4 (10th Cir. 1998)*; *see Tele-Communications, Inc. v. Commissioner, 104 F.3d 1229, 1233 (10th Cir. 1997)* ("[T]o preserve the integrity of the appellate structure, we should not be considered a 'second shot' forum . . . where secondary, back-up theories may be mounted for the first time.").

Ecclesiastes did not preserve this issue for appeal. Although Ecclesiastes claims that the question of "whether the case should be dismissed under *Rule 41(b)* **[*18]** . . . was the whole focus of the matter in the district court," Aplt. Reply Br. at 15, there is a palpable distinction between challenging the correctness of the district court's *Rule 41(b)* analysis and challenging the applicability of *Rule 41(b)* itself. *Cf. Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721-22 (10th Cir. 1993)* (raising of related theory before district court insufficient to preserve issue for appeal). The district court never addressed the latter issue -- *i.e.*, the applicability *vel non* of *Rule 41(b)* -- in its May 24, 2005 ruling or in its June 20, 2005 opinion. Ecclesiastes's appellate briefs, moreover, do not identify a place in the record where Ecclesiastes or any other plaintiff argued that *Rule 41(b)* is inapposite. *See 10th Cir. R. 28.2(C)(2)* ("For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on."); *see also State Ins. Fund v. Ace Transp. Inc., 195 F.3d 561, 565 n.3 (10th Cir. 1999)* (refusing to consider argument when appellant fails to show where in record issue was raised and resolved).

Ecclesiastes conceded at oral argument that this issue was not raised with specificity before the **[*19]** district court. Ecclesiastes nonetheless identified pages in the record where this contention allegedly was raised by implication. *See* App. at 878, 1007-08, 1016-17. Our review of those pages, however, fails to confirm Ecclesiastes's representation. For the most part, Ecclesiastes simply argued that it was improper for the district court to dismiss plaintiffs' action on any ground other than the substantive merits. *E.g., id.* at 1016-17 ("[I]f the case is going to be dismissed because John DeLorean died, it ought to be dismissed because substantively the case can't be proven without Mr. DeLorean present.").

Ecclesiastes also invoked at oral argument the "plain error" doctrine. Yet, this doctrine provides no aid. Although the "plain error" doctrine is typically applied in the civil context to address trial-related errors, *see Fed. R. Civ. P. 51(d)(2)* and *Fed. R. Evid. 103(d)*, we have performed a plain-error analysis in civil litigation to address alleged pre-trial errors. *See Employers Reinsurance Corp. v. Mid-Continent Cas. Co., 358 F.3d 757, 769-70 (10th Cir. 2004)* (applying "plain error" analysis to alleged error in resolution of summary judgment motions).

However, like the plaintiff **[*20]** in *Employers Reinsurance Corp.*, Ecclesiastes has failed in seeking plain-error review to carry its "nearly insurmountable

burden." *Quigley v. Rosenthal, 327 F.3d 1044, 1063 (10th Cir. 2003)* (internal quotation marks omitted). The use of the failure-to-prosecute component of *Rule 41(b)*, rather than *Rule 37(a)*, was not plainly erroneous, based upon the history of this litigation and the district court's inventory of the myriad forms of Ecclesiastes's dilatory behavior following the recommencement of discovery on March 10, 2004. [9] *Cf. Rogers, 357 U.S. at 207-08* (holding that *Rule 37* is the exclusive mechanism for dismissal of complaint due to singular issue of noncompliance with order requiring production of discovery).

> 9 Ecclesiastes's argument misinterprets the scope of the factual basis for the district court's use of *Rule 41(b)*. The district court did not expressly rest its decision on Ecclesiastes's failure to comply with a discovery order. Nor did the district court rest its failure-to-prosecute finding *solely* upon Ecclesiastes's failure to make a corporate designation under *Rule 30(b)(6)*, conduct which would fall under the province of *Rule 37(a)*. Instead, as discussed *infra*, the **[*21]** district court found that a *Rule 41(b)* dismissal was appropriate because Ecclesiastes willfully engaged in a process of delay that resulted in the loss of vital *Rule 30(b)(6)* testimony.

Furthermore, assuming *arguendo* that there was error, this error certainly did not result in a miscarriage of justice that seriously affected "the fairness, integrity or public reputation of judicial proceedings." *Sloan v. State Farm Mut. Auto. Ins. Co., 360 F.3d 1220, 1226 (10th Cir. 2004)*; *see Employers Reinsurance Corp., 358 F.3d at 770*. Significantly, the same test that district courts employ in our circuit in considering motions for dismissal under *Rule 41(b)* -- the *Ehrenhaus* test -- could have been used by the district court here to dismiss the action under its inherent authority, without regard to the availability of a *Rule 37* sanction. *Chavez v. City of Albuquerque, 402 F.3d 1039, 1043-44 (10th Cir. 2005)* (*Ehrenhaus* dismissal analysis applies when district court invokes inherent power to dismiss jury verdict due to plaintiff's perjury at trial); *see Chambers v. NASCO, Inc., 501 U.S. 32, 49, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (noting that "inherent power of a court can be invoked even if procedural rules exist which sanction **[*22]** the same conduct"). Consequently, we would be hard pressed to conclude that the district court's invocation of *Ehrenhaus* under the *Rule 41(b)* framework resulted in a miscarriage of justice and rendered its dismissal of the case fundamentally unfair.

B. Appropriateness of Dismissal

[HN4] This Court reviews for an abuse of discretion a district court's decision to dismiss an action for failure to prosecute. *E.g., Nasious v. Two Unknown B.I.C.E. Agents, No. 07-1105, __ F.3d __, 2007 U.S. App. LEXIS 15922, at *5, 2007 WL 1895877, at * 2 (10th Cir. July 3, 2007)* ("We review dismissals under *Rule 41(b)* for abuse of discretion."); *see Gripe v. City of Enid, Okla., 312 F.3d 1184, 1188 (10th Cir. 2002)*. An abuse of discretion occurs when a district court makes "a clear error of judgment or exceed[s] the bounds of permissible choice in the circumstances." *McEwen v. City of Norman, Okla., 926 F.2d 1539, 1553-54 (10th Cir. 1991)*. This occurs when a district court relies upon an erroneous conclusion of law or upon clearly erroneous findings of fact. *See Ashby v. McKenna, 331 F.3d 1148, 1149 (10th Cir. 2003)*. Applying this deferential standard, we affirm the district court's dismissal order.

[HN5] *Rule 41(b)* states, "For failure of the plaintiff **[*23]** to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." *Fed. R. Civ. P. 41(b)*. The sanction of dismissal with prejudice for failure to prosecute is a "severe sanction," a measure of last resort. *Jones v. Thompson, 996 F.2d 261, 265 (10th Cir. 1993)*; *see Meade v. Grubbs, 841 F.2d 1512, 1521 n.7 (10th Cir. 1988)*.

[HN6] We have identified a non-exhaustive list of factors that a district court ordinarily should consider in determining whether to dismiss an action with prejudice under *Rule 41(b)*: (1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions. [10] *Ehrenhaus, 965 F.2d at 921*; *see Mobley v. McCormick, 40 F.3d 337, 341 (10th Cir. 1993)* ("*Rule 41(b)* involuntary dismissals should be determined by reference to the *Ehrenhaus* criteria."). Under this flexible framework, established in our *Ehrenhaus* decision, dismissal is warranted when "the aggravating factors **[*24]** outweigh the judicial system's strong predisposition to resolve cases on their merits." *Ehrenhaus, 965 F.2d at 921* (internal quotation marks omitted; quoting *Meade, 841 F.2d at 1521 n.7*).

10 By contrast, a district court need not follow "any particular procedures" when dismissing an action without prejudice under *Rule 41(b)*. *Nasious, __ F.3d __, 2007 U.S. App. LEXIS 15922, at *6, 2007 WL 1895877, at *2*. Only a dismissal with prejudice triggers the *Ehrenhaus* criteria because it is "a significantly harsher remedy -- the death penalty of pleading punishments." *Id.*

Ecclesiastes concedes that the district court addressed each factor of the *Ehrenhaus* test. Ecclesiastes nonetheless challenges the correctness of the district court's application of each factor and, hence, its ultimate conclusion.

1. Degree of Actual Prejudice

The district court found that the loss of DeLorean's deposition testimony -- the product of Ecclesiastes's dilatoriness -- actually prejudiced defendants. The district court reasoned that the content and credibility of DeLorean's testimony was essential to Ecclesiastes's claims and defendants' defense of those claims, and also to defendants' counterclaims. The district court noted, moreover, that both parties **[*25]** recognized the critical value of this testimony.

Ecclesiastes contests this finding, arguing that DeLorean's death only injured the likelihood of success of plaintiffs' claims. In fact, Ecclesiastes reasons that DeLorean's death inured to defendants' benefit, relieving defendants of the task of impeaching his credibility or rebutting his statements at trial. According to Ecclesiastes, the extent of defendants' loss was the "opportunity to conduct what they hoped would be a successful cross examination of Ecclesiastes' primary witness." Aplt. Br. at 20.

We agree with the district court's analysis. Ecclesiastes's position overlooks the crucial function of the discovery process. For instance, defendants were entitled to investigate the merits of the DeLorean-specific allegations in plaintiffs' complaint. According to these averments, DeLorean possessed information concerning, *inter alia*, the negotiation of the APA, the meaning of allegedly ambiguous provisions in the APA, [11] the defendants' allegedly fraudulent statements, and the extent of Ecclesiastes's compliance with its post-closing obligations.

11 As the district court properly perceived, defendants were entitled to explore DeLorean's **[*26]** and Ecclesiastes's understanding of the meaning of these allegedly "ambiguous" passages, even though the district court might have found later that the APA is unambiguous and, through application of the parol evidence rule, excluded such testimony at trial. *See Fed. R. Civ. P. 26(b)* (parties may obtain discovery of any non-privileged matter "relevant to the claim or defense of any party," which covers any request "reasonably calculated to lead to the discovery of admissible evidence"). Furthermore, contrary to Ecclesiastes's assertions, the presence of an integration clause in the APA would not *per se* exclude DeLorean's testimony as to the APA's meaning if portions of the APA were found to be ambiguous. *See, e.g., Proteus Books Ltd. v. Cherry Lane Music Co., Inc., 873 F.2d 502, 509-10 (2d Cir. 1989)* (applying New York law); *Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985)* (applying Utah law).

In fact, as the district court noted, DeLorean was "alleged to have been the only negotiator of [the] transaction on behalf of the corporate plaintiffs and the recipient on their behalf of the alleged fraudulent statements delivered by defendants." App. at 930. The loss of DeLorean's deposition **[*27]** testimony prevented defendants from fashioning an effective defense to Ecclesiastes's fraud-related and contract-related claims.

Similarly, defendants had considerable need to explore, through DeLorean, Ecclesiastes's knowledge of facts relevant to defendants' counterclaims. For instance, defendants filed breach of contract, negligent misrepresentation, and fraud-in-the-inducement counterclaims. To establish these claims, defendants needed to depose DeLorean. The topics of particular significance to them, as to these counterclaims, included: (1) DeLorean's pre-transaction representations; (2) DeLorean's notes and correspondence regarding the execution of the APA; (3) the unexpected and arguably suspicious emergence of corporate documents purporting to show that the pension plan was terminated in 1988; (4) DeLorean's preparation of arguably conflicting calculations of the purchase-price adjustments; and (5) Delorean's post-closing correspondence with Ecclesiastes's accountants.

Indeed, Ecclesiastes asserted that DeLorean was the "only person" with information relevant to certain subjects in defendants' *Rule 30(b)(6)* notice. Its failure to permit DeLorean's knowledge to be memorialized **[*28]** prior to his death consequently deprived defendants of the ability to gather facts essential to the success of their counterclaims against Ecclesiastes.

This prejudice is further confirmed by the parties' express recognition of DeLorean's integral role in this litigation. In order to secure DeLorean's attendance at trial, defendants filed a motion to transfer venue to the Southern District of New York, labeling DeLorean as "probably the single most critical witness in this case." App. at 403. In defending against this motion, Ecclesiastes conceded not only that DeLorean's testimony was "essential" to its case, but also that "[i]t would be silly to think we could put on our case without him." [12] App. at 1046. Furthermore, the district court acknowledged the indispensability of DeLorean's testimony, going so far as to command plaintiffs to file a statement guaranteeing that, "absent legitimate health reasons," Ecclesiastes would produce DeLorean at trial. App. at 1050.

> 12 Ecclesiastes argues that Lambert, its local counsel, had no authority to speak on behalf of Ecclesiastes at the motion to transfer venue hearing, and that Lambert "conceded at the time" that he lacked the authority. Aplt. **[*29]** Reply Br. at 9. Ecclesiastes's record citations, however, do not evince Lambert's purported concession. And there is certainly "nothing novel" about holding clients responsible for the conduct of their attorneys, even conduct they did not know about. *See, e.g., Gripe, 312 F.3d at 1188-89* (affirming dismissal under *Rule 41(b)* without direct evidence of plaintiffs' knowledge of attorney's derelictions because litigant bound by actions of attorney). *Cf. Link v. Wabash R.R. Co., 370 U.S. 626, 633, 634, 82 S. Ct. 1386, 8 L. Ed. 2d 734 & n.10 (1962)* (affirming dismissal under trial court's inherent authority for attorney's misconduct, including unexplained absence from pretrial conference; observing that plaintiff "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").
>
> Nor did the district court misinterpret Ecclesiastes's admission. The entire statement reads as follows: "I will offer it as a solution because, as [defense] counsel accurately points out, Mr. DeLorean is essential to our case. It would be silly to think we could put on our case without him." App. at 1046.

In sum, even if DeLorean's testimony would **[*30]** not have facilitated the success of defendants' defenses and counterclaims, defendants lost forever the opportunity to make that determination. At least equally as important, they lost an opportunity to gain relevant information as to Ecclesiastes's perception of the factual basis of the parties' claims. Under the standards of our caselaw, defendants clearly suffered prejudice. *See Gripe, 312 F.3d at 1188* (concluding that district court rested its dismissal order on "appropriate considerations" under *Ehrenhaus* test when it found "on at least two occasions that plaintiff's failure to follow court orders and rules had inconvenienced and prejudiced defendants and the court"); *Jones, 996 F.2d at 264* (using *Ehrenhaus* test and noting that, due to plaintiffs' discovery non-compliance, "Defendants suffered prejudice in preparing for trial without the opportunity to depose the Plaintiffs").

2. Degree of Interference

The district court itemized Ecclesiastes's unilateral, discovery-related misconduct. The district court found this misconduct to be "willful" and aimed, at least in significant part, at "avoid[ing] having Mr. DeLorean deposed as Ecclesiastes's corporate representative." App. at 934. **[*31]** It ultimately ruled that Ecclesiastes's misconduct interfered with its process. *Id.*

Ecclesiastes responds that it was engaged in "a legitimate, good faith dispute" over the propriety of defendants' invocation of *Rule 30(b)(6)* and that such a dispute "does not equate to interference with judicial process." Aplt. Br. at 22. We reject Ecclesiastes's position.

As an initial matter, Ecclesiastes's dilatoriness during the discovery process went beyond a mere "discovery dispute" over whether Ecclesiastes was required to designate *Rule 30(b)(6)* representatives. The district court thoroughly documented the litany of dilatory conduct: Ecclesiastes's failure to designate corporate representatives until at least *four months after* defendants' *Rule 30(b)(6)* notice; Ecclesiastes's failure to

communicate in a timely and responsive fashion with defendants during the discovery period; Ecclesiastes's failure to produce DeLorean for a *Rule 30(b)(6)* deposition, even after designating him, despite repeated written attempts by defendants' counsel to secure an exact date for his deposition; and Ecclesiastes's sudden and "inexplicabl[e]" withdrawal of DeLorean as a *Rule 30(b)(6)* designee. App. at 934; *see id.* at 933. **[*32]** This behavior clearly violated the district court's mandate to proceed with "all dispatch." App. at 1106. And, consequently, we cannot conclude that the district court erred in finding that Ecclesiastes interfered with its process. *See, e.g., Archibeque v. Atchison, Topeka and Santa Fe Ry. Co., 70 F.3d 1172, 1174-75 (10th Cir. 1995)* (upholding district court's finding that plaintiff's willful failure to disclose requested information during discovery amounted to a serious interference with the judicial process).

Furthermore, Ecclesiastes's contention that it operated under a good-faith belief that it could decline to make *Rule 30(b)(6)* designations because it lacked control of potential designees strains credulity. [HN7] The law is well-settled that corporations have an "affirmative duty" to make available as many persons as necessary to give "complete, knowledgeable, and binding answers" on the corporation's behalf. *Reilly v. Natwest Mkts. Group Inc., 181 F.3d 253, 268 (2d Cir. 1999)* (internal quotation marks omitted; quoting *Sec. & Exch. Comm'n v. Morelli, 143 F.R.D. 42, 45 (S.D.N.Y. 1992)*); *see Fed. R. Civ. P. 30(b)(6)* ("organization so named *shall* designate one or more officers, directors, **[*33]** or managing agents, or other persons who consent to testify on its behalf" (emphasis added)).

This duty is not negated by a corporation's alleged lack of control over potential *Rule 30(b)(6)* deponents. *See Resolution Trust Corp. v. S. Union Co., Inc., 985 F.2d 196, 197 (5th Cir. 1993)* (noting that *Rule 30(b)(6)* places the burden of identifying responsive witness for corporate deposition on corporation); Roger Fendrich and Kent Sinclair, *Discovering Corporate Knowledge and Contentions, 50 Ala. L. Rev. 651, 665 (1999)* (noting that "[a]ny witness who can gather responsive information may be designated by the company" and that, in "one common scenario," corporations designate individuals who "lack[] personal knowledge" of the events giving rise to the litigation but who have otherwise been educated about it). [13]

13 Ecclesiastes relies primarily upon the Fendrich and Sinclair law review article to support its legal position. (Aplt. Br. at 22-25.) The article offers, however, no meaningful assistance. While highlighting the many ways in which civil plaintiffs may abuse the *Rule 30(b)(6)* process, the article emphasizes that a "corporation is obligated to comply" with a *Rule 30(b)(6)* notice, **[*34]** even though it need not designate a former employee. *Id. at 664*; *see id. at 654-57, 665.* It further notes that "the view that the duty to educate a person with no prior knowledge is 'prejudicial' to a corporation has not prevailed, and it appears now to be recognized that the *Rule 30(b)(6)* deponent must be woodshedded with information that was never known to the witness prior to deposition preparation." *Id. at 689-90* (footnotes omitted); *see id. at 687* ("Using the discovering party's roster of desired information as a guide, the entity is expected to *create* a witness with responsive knowledge."). Therefore, even Ecclesiastes's own authority reveals that, under the facts of this case, Ecclesiastes was required to produce a knowledgeable deponent, whether DeLorean or a third-party educated by Ecclesiastes on relevant matters.

We also note that, insofar as lack of control is a consideration in the operation of *Rule 30(b)(6)*, this absence of control is not established by an individual's status as a corporate officer or director. *See Fed. R. Civ. P. 30(b)(6)* & advisory committee's note, 1970 amendment (evincing that "officers, directors, or managing agents" are typical *Rule 30(b)(6)* designees **[*35]** and others may be designated "but only with their consent"). Indeed, [HN8] the 1970 amendments to *Rule 30* expressly removed the previous distinction between directors, on one hand, and managing agents and officers, on the other; a corporation now is *deemed* to have legal control over its directors, like its managing agents and officers, for deposition purposes. *Id.*; *see also* 8A Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, *Federal Practice & Procedure* § 2103, at 37-39 (1994) (discussing the effects of the complimentary 1970 amendments to *Rule 30(b)* and *Rule 37(d)* that, respectively, rejected the notion that a corporation lacks "power over its directors," and, therefore, mandated that a "corporation is *responsible* for producing its . . . directors if notice is given" (emphasis added)). The text and history of *Rule 30(b)(6)* clearly defeat Ecclesiastes's

contention that DeLorean's status as only "an officer or director on paper" had the effect of eliminating its legal control over him. Aplt. Reply Br. at 6. Accordingly, Ecclesiastes cannot reasonably predicate its purported good-faith belief on this theory.

To show good faith, Ecclesiastes had to promptly respond in *some* fashion to **[*36]** defendants' *Rule 30(b)(6)* notice. Ecclesiastes could have promptly informed defendants of its alleged concerns about the propriety of their *Rule 30(b)(6)* notice. Or Ecclesiastes could have explained its purported inability to provide information responsive to the notice. Then, failing a negotiated resolution with defendants, Ecclesiastes could have sought a protective order from the district court. *See EEOC v. Thurston Motor Lines, Inc., 124 F.R.D. 110, 114 (M.D. N.C. 1989)* (imposing *Rule 37* sanctions on successor to corporate party served with *Rule 30(b)(6)* notice because successor "had absolutely no right . . . to refuse to designate a witness. If it had an objection to discovery, its opportunity was to request a protective order . . . ."). *Cf. Fed. R. Civ. P. 30(b)(6)* advisory committee's note, 1970 amendments (noting availability of protective orders to curb possible excesses in corporate discovery practices and specifically stating that "a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subdivision"). Yet, the record reveals no sign that Ecclesiastes followed this or a similarly responsive **[*37]** path.

Instead, Ecclesiastes delayed for at least four months -- without noting any legal objections -- before it offered a roster of *Rule 30(b)(6)* witnesses, including DeLorean. Then, Ecclesiastes allowed weeks to elapse before it withdrew these witnesses. In particular, it allowed a considerable period to pass before it withdrew the unquestionably most important *Rule 30(b)(6)* witness, DeLorean. Significantly, these withdrawal decisions were not based upon newly-emergent facts or circumstances. Rather, Ecclesiastes withdrew its designees based upon concerns regarding their alleged third-party status -- concerns that should have been apparent to Ecclesiastes when defendants first issued their *Rule 30(b)(6)* notice in March 2004.

Therefore, we reject Ecclesiastes's argument that the district court erred in basing its interference finding on Ecclesiastes's alleged good-faith dispute over *Rule 30(b)(6)* discovery. Put simply, Ecclesiastes's conduct involved more than a simple discovery dispute over *Rule 30(b)(6)* designations, and we cannot conclude that Ecclesiastes acted in good faith.

3. Culpability of Ecclesiastes

The district court found that, as a consequence of Ecclesiastes's "willful **[*38]** effort" to avoid DeLorean's *Rule 30(b)(6)* deposition, his "critical testimony" was not preserved. App. at 994. Ecclesiastes contests this finding, arguing that it was not required to designate DeLorean as its corporate designee because he was not within its control, and that it offered to arrange deposition dates for DeLorean in his personal capacity on multiple occasions.

Ecclesiastes's protestations ring hollow. As indicated above, Ecclesiastes's lack-of-control argument rests on a dubious legal foundation. Furthermore, irrespective of whether Ecclesiastes was required to designate DeLorean, it *did* designate DeLorean. [14] Inexplicably, it waited at least four months to do so.

> 14 It is somewhat odd that Ecclesiastes's arguments appear to erroneously assume that it never designated DeLorean under *Rule 30(b)(6)*. *See* Aplt. Br. at 30 ("The reason that DeLorean was not deposed earlier was due entirely to the fact that Defendants' counsel would not proceed *unless* and until Ecclesiastes made a 30(b)(6) designation . . . . Ecclesiastes resisted this ultimatum . . . ." (emphasis added)).

Ecclesiastes must have understood DeLorean's central role in the negotiation and closing of the APA. Indeed, **[*39]** during the course of the litigation, Ecclesiastes conceded that DeLorean was Ecclesiastes's sole remaining officer and director, and the only individual who could address certain topics in defendants' *Rule 30(b)(6)* notice. Accordingly, DeLorean should have been front and center for Ecclesiastes as a *Rule 30(b)(6)* designee.

Then, after it finally designated DeLorean, Ecclesiastes willfully and unreasonably failed to communicate with defendants to nail down deposition dates for him and the other *Rule 30(b)(6)* witnesses. During all of this time, moreover, Ecclesiastes was well aware of DeLorean's advanced age and fragile health. Even more egregiously, Ecclesiastes chose to withdraw its *Rule 30(b)(6)* designation eight months after being served with defendants' *Rule 30(b)(6)* notice, which

necessarily implicated DeLorean's testimony. Reciting this litany of Ecclesiastes's willful misconduct supplies the answer to the question before us: that is, the district court did not err in finding under our *Ehrenhaus* analysis that Ecclesiastes was culpable.

It is true that Ecclesiastes expressed a willingness to make arrangements for defendants to depose DeLorean solely in his personal capacity. This **[*40]** fact, however, is beside the point. DeLorean was uniquely situated to respond to certain inquires raised in defendants' *Rule 30(b)(6)* notice. In the absence of a court ruling to the contrary, defendants were legally entitled to answers to those inquiries. Ecclesiastes's presentation of DeLorean for a deposition solely in his personal capacity could not have satisfied defendants' evidentiary needs. And, with DeLorean's death, these needs will never be satisfied.

4. Advance Notice of Sanction of Dismissal

The district court found that Ecclesiastes had "constructive notice" of the possibility of dismissal for future delays. The district court inferred constructive notice from the following events: its consideration of defendants' first *Rule 41(b)* motion to dismiss; its March 10, 2004 mandate that the parties proceed with "all dispatch"; Ecclesiastes's necessary recognition of the imperative of promptly conducting DeLorean's deposition as a corporate representative, due to DeLorean's age, health, and inimitable capacity to satisfy the inquiries of defendants' *Rule 30(b)(6)* notice; defendants' motion to compel and its accurate recitation of Ecclesiastes's *Rule 30(b)(6)* obligations; and the **[*41]** court's warning at the January 2005 hearing on defendants' motion to transfer that if DeLorean "was not made available at trial, barring impossibility, the Court would dismiss plaintiffs' claims against defendants." App. at 935-36.

Ecclesiastes's primary argument on appeal is that this prong cannot be satisfied without a specific warning by the district court of the possibility of dismissal in the event of the commission of identified misconduct. Under this formulation, constructive notice, as a matter of law, does not satisfy the notice prong of the *Ehrenhaus* test. Ecclesiastes further argues that, even if constructive notice is legally sufficient, the notice in this instance was inadequate because it did not occur in connection with the conduct forming the basis for the dismissal.

At the outset, we must point out that [HN9] notice is not a prerequisite for dismissal under *Ehrenhaus*. *See Archibeque, 70 F.3d at 1175* (affirming dismissal pursuant to *Ehrenhaus* test despite absence of warning as to imminent dismissal). *Cf. Link, 370 U.S. at 632* (upholding dismissal predicated upon trial court's inherent authority and stating that "absence of notice as to the possibility of dismissal . . . [does **[*42]** not] necessarily render such a dismissal void"). Nonetheless, because notice is an important element in the *Ehrenhaus* analysis, we address Ecclesiastes's challenge.

Frequently, when we have concluded that *Ehrenhaus*'s notice prong has been met, the trial court has indeed expressly identified dismissal as a likely sanction. *See Gripe, 312 F.3d at 1188*; *Jones, 996 F.2d at 265*. However, we have never declared this form of express notice to be the *minimum* standard for satisfaction of the notice prong. In fact, we have applied a less exacting standard. For instance, in *Ehrenhaus* itself, we concluded that an oral warning to "*expect* a motion from the defendants that [the] case be dismissed for failure to cooperate in discovery," if plaintiff failed to attend a continued deposition, "put Ehrenhaus [plaintiff] on notice that failure to comply" would subject his claims to dismissal. *Ehrenhaus, 965 F.2d at 921* (emphasis added).

The district court in *Ehrenhaus* did not promise to dismiss the action in the event of plaintiff's failure to cooperate. Nor did it even assert that dismissal would be the likely judicial sanction for such a failure. It simply indicated that dismissal would become an issue **[*43]** if plaintiff failed to cooperate, and that it would entertain a motion seeking such relief. Therefore, constructive notice -- that is, notice (1) without an express warning and (2) objectively based upon the totality of the circumstances (most importantly, the trial court's actions or words) -- was precisely the kind of notice that we considered in *Ehrenhaus* and deemed to be sufficient. Ecclesiastes's attempt to map an express-warning requirement onto *Ehrenhaus's* notice prong is therefore fatally undercut by the facts of *Ehrenhaus* itself.

Further, we note that Ecclesiastes has failed to cite binding or persuasive caselaw holding that constructive notice is legally insufficient to satisfy *Ehrenhaus's* notice prong. In fact, the lone case upon which Ecclesiastes relies, *Salahuddin v. Harris, 782 F.2d 1127 (2d Cir. 1986)*, is inapposite: the Second Circuit did not reject the concept of constructive notice in a *Rule 41(b)* context, but, instead, refused to imply the existence of a discovery order to support the district court's sanction of dismissal

under *Rule 37(b). See Harris, 782 F.2d at 1132.*

Applying this constructive notice methodology, we affirm the district court's finding. Ecclesiastes **[*44]** was warned of the possibility of dismissal when the district court denied defendants' first motion to dismiss for lack of prosecution. And the district court stated that, if plaintiffs are to blame for the loss of evidence, it "will be able to apply sanctions on an issue-by-issue, evidence-by-evidence basis." App. at 1106. The district court further warned the parties to proceed "with all dispatch." *Id.*

Like *Ehrenhaus*, it is true that the district court here never *promised* to dismiss the case in the event of dilatoriness or evidentiary losses. But it certainly left open, if not highlighted, such a possibility. In fact, Ecclesiastes recognized the likelihood of this outcome when its counsel declared, in opposition to defendants' motion to transfer venue, that it would be "practicable" for the district court to default Ecclesiastes if it failed to produce DeLorean, based upon the importance of DeLorean's testimony to its claims. App. at 1044.

Ecclesiastes's contention that the district court's constructive notice was inadequate because it did not occur in relation to the conduct forming the basis for the dismissal is misguided. It is premised upon the notion that the conduct at issue **[*45]** was solely Ecclesiastes's purported good-faith resistance to designating witnesses under *Rule 30(b)(6). See* Aplt. Br. at 28 (acknowledging district court's reference to "all dispatch" notice, and stating that "[t]he remaining 'notices' arose in December of 2004 and January of 2005, *after* the 30(b)(6) dispute had already become the subject of a Motion to Compel. In opposing the 30(b)(6) notice, Ecclesiastes could not have anticipated that DeLorean would die, or that his death would be grounds for dismissal." (emphasis added)). However, as discussed above, Ecclesiastes's willful misconduct went beyond a simple dispute over the designation of *Rule 30(b)(6)* witnesses, and the record does not support a determination that Ecclesiastes operated in good faith.

Accordingly, on these facts, we conclude that *Ehrenhaus's* notice prong was satisfied.

5. Availability of Lesser Sanctions

The district court acknowledged the gravity of the dismissal sanction, but found it to be the only appropriate remedy due to the incurable loss of DeLorean's "unique and critical testimony." App. at 936. In the proceedings below, Ecclesiastes failed to identify an appropriate sanction short of dismissal. Nor has Ecclesiastes **[*46]** done so on appeal. Thus, the district court did not err in finding the non-availability of lesser sanctions.

III. CONCLUSION

The district court thoroughly considered and properly applied the *Ehrenhaus* criteria. It did not abuse its discretion in dismissing the action pursuant to *Rule 41(b).* Accordingly, we **AFFIRM**.